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No. 94-677

(2)

In The

Supreme Court of the United States

October Term, 1994

PETER P. NGHIEM,

Petitioner,

v.

NEC ELECTRONICS, INC., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

The sole question presented is whether the United States Court of Appeals for the Ninth Circuit properly affirmed the Order of the United States District Court, Northern District, California, granting Respondent NEC Electronics, Inc.'s motion for confirmation of the arbitration award and dismissal of Petitioner Peter P. Nghiem's action, where the Ninth Circuit affirmed the district court's factual finding that said Petitioner voluntarily initiated, in writing, final and binding arbitration.

LIST OF PARENT COMPANIES AND SUBSIDIARIES

Pursuant to the Rules of the Supreme Court of the United States, Rule 29.1, Respondent NEC Electronics, Inc. states as follows:

Parent: NEC Corporation
7-1 Sheiba 5-Chome Minato-Ko
Tokyo, 108-01
Japan

Affiliates: NEC Industries, Inc.
NEC Research Institute, Inc.
NEC America, Inc.
NEC Technologies, Inc.
NEC Systems Laboratories, Inc.
NEC Business Communications Systems, Inc.
MNI Corporation
HNSX Super Computers, Inc.

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RESPONDENT'S BRIEF IN OPPOSITION

JURISDICTION

The Opinion of the Ninth Circuit Court of Appeals was decided on June 3, 1994. Petitioner invokes the jurisdiction of this Court under the Rules of the Supreme Court of the United States, Rule 20, 28 U.S.C. Section 1254(1), and 28 U.S.C. Section 1651(a).

STATUTORY PROVISIONS INVOLVED

Section 2 of the Federal Arbitration Act (hereinafter referred to as "FAA"), 9 U.S.C. § 2, provides, in pertinent part, that an agreement in writing to submit to arbitration

an existing controversy arising out of such a contract, transaction or refusal, shall be valid, irrevocable, and enforceable, except upon such grounds as exist at law or in equity for the revocation of any contract. Section 1 of the FAA, 9 U.S.C. § 1, provides an exception to section 2 for contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

15 U.S.C. § 1 declares that every contract, combination or conspiracy in restraint of trade or commerce is illegal. 15 U.S.C. § 15, in pertinent part, provides that standing to assert an antitrust claim inures to any person who is injured in his business or property by reason of anything forbidden in the antitrust laws.

The Respondent, NEC Electronics, Inc. (hereinafter "Respondent" or "NECEL"), respectfully requests that this Court deny the Petition for Writ of Certiorari in which Petitioner, Peter P. Nghiem (hereinafter "Petitioner" or "Nghiem"), seeks review of the Ninth Circuit Decision filed June 3, 1994 in this case. Said Decision is set forth at page 1a of the Appendix A to the Petition for Writ of Certiorari (hereinafter "Pet. App. A") filed by Petitioner herein.

STATEMENT

Rule 14.1.(g) of the Rules of the Supreme Court of the United States requires that a petition for writ of certiorari include a concise statement of the case containing the facts material to the consideration of the questions presented. Petitioner's statement of the case does not comply

with the foregoing mandate. (*See*, Petition for Writ of Certiorari filed by Petitioner Peter Nghiem, hereinafter cited as "Pet.," at 4-9.) To assist this Court in the exercise of its discretionary jurisdiction, Respondent NECEL herein below sets forth the material facts and the proceedings with citations to the record.

STATEMENT OF THE CASE

Petitioner Peter Nghiem, an American citizen of Vietnamese heritage, was employed by Respondent NECEL from August 31, 1989, until he was fired in June 1990. (Pet. App. A at 2a; District Court's Order Granting Defendant's Motion for Confirmation of the Arbitration Award and Dismissal of Action included in Petitioner's Appendix C (hereinafter "Pet. App. C") at 14a-15a.) Nghiem signed an employment contract on August 31, 1989, which did not contain an arbitration clause. (Pet. App. A at 2a.) On September 5, 1989 and May 7, 1990, Nghiem signed acknowledgements of receipt of NECEL's company handbook which explained that NECEL maintained a "Problem Resolution Process" for "disputes, problems, complaints or claims" raised by employees arising out of their own or the company's conduct or the employment relationship, including its termination. (Pet. App. A. at 2a-3a; Pet. App. C. at 15a.) NECEL's problem resolution process concludes in its "Step 4" with "final and legally binding" arbitration according to its express terms. (Pet. App. A at 3a; Pet. App. C at 15a.) Significantly, Nghiem claims that he did not sign a modified version of NECEL's employment contract because it contained a

clause for binding arbitration. (Pet. App. A at 2a.) Nonetheless, Nghiem voluntarily initiated binding arbitration in a written letter to NECEL's Human Resources Director, Denny Mitchell, requesting to proceed with Step 4 of NECEL's problem resolution process – final and binding arbitration. (Pet. App. A at 4a; Pet. App. C at 15a.)

As a result of Petitioner following the problem resolution process through its four steps into arbitration, an arbitration hearing was held before Arbitrator John Kagel in a proceeding before the American Arbitration Association. (Pet. App. C at 15a.) Nghiem presented evidence and argument in the arbitration hearings, including a 50-page closing brief. (Pet. App. A at 3a; Pet. App. C at 15a.)

The Arbitrator then issued a decision dated November 18, 1991, denying Appellant all his requested relief. (Pet. App. A at 3a; Pet. App. C at 15a.) According to the Arbitrator, and as expressly set forth in Nghiem's arbitration complaint, the claims raised in Nghiem's arbitration complaint include the following: "wrongful termination, breach of implied contract, breach of the covenant of good faith and fair dealing, intentional infliction of emotional distress, defamation and antitrust . . . . " (Arbitration Award attached hereto as Respondent's Appendix (hereinafter "Res. App.") 22-23; Nghiem's Arbitration Complaint attached hereto as Res. App. 1.) The Arbitrator also addressed and ruled against Nghiem on the fraudulent misrepresentation and race discrimination allegations. (Res. App. 36.) On November 27, 1991, Nghiem wrote the American Arbitration Association ("AAA") to request a trial de novo and to argue that the arbitration was not binding on him. (Pet. App. A at 3a.)

On June 10, 1991, while the arbitration was proceeding, Nghiem filed suit in state court on substantially the same issues. (Pet. App. A at 3a.) NECEL removed the state action to federal district court on March 6, 1992. On June 9, 1992, the Honorable Ronald M. Whyte of the U.S. District Court for the Northern District of California granted NECEL's motion for confirmation of the arbitration award and dismissed Petitioner's complaint in its entirety, including the statutory claims of employment discrimination and antitrust violation. (Pet. App. C at 17a.)

Petitioner appealed the district court's decision on October 14, 1992. On June 3, 1994, the Ninth Circuit Court of Appeals affirmed the district court's confirmation of the arbitration award and dismissal of Petitioner's action, in a decision reported as *Nghiem v. NEC Electronics, Inc.*, 25 F.3d 1437 (9th Cir. 1994). Nghiem filed a Petition for Rehearing with Suggestion for Rehearing En Banc on June 17, 1994. (Pet. App. D at 19a.) Rehearing was denied on July 14, 1994, and no judge of the Ninth Circuit requested a vote on the en banc suggestion. (Pet. App. B at 12a-13a.)

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Petition Fails To Present Grounds For The Issuance Of An Extraordinary Writ Authorized By 28 U.S.C. Section 1651(a) Under Supreme Court Rule 20.

The Petition invokes the jurisdiction of this Court under the provisions of 28 U.S.C. section 1651(a) and Rule 20 of the Supreme Court Rules. (Pet. at 1-2.) The issuance of an extraordinary writ is not a matter of right, and discretion should be sparingly exercised. Supreme Court Rule 20.1. In order to justify the granting of any writ under 28 U.S.C. section 1651(a), Petitioner must show: (1) that the writ will be in aid of this Court's appellate jurisdiction; (2) that there are exceptional circumstances warranting the exercise of this Court's discretionary powers; *and* (3) that adequate relief cannot be obtained in any other form or from any other court. *Id.* Petitioner has failed to show the presence of exceptional circumstances warranting the exercise of this Court's discretionary powers.

Petitioner claims exceptional circumstances arising exclusively from the fact that "all other possible avenues of potential relief in federal courts have been exhausted but Petitioner's constitutional right to due process and his causes of action under Title VII and antitrust laws were still not considered."[1] (Pet. at 11.) This is merely a

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[1] The reason Petitioner's newly-raised claim of a constitutional right to due process has not been considered is because it has never been timely raised in any proceeding by the Petitioner, as discussed below. Moreover, Petitioner's causes of

restatement of the third requirement cited in Supreme Court Rule 20.1; in other words, Petitioner would have this Court find that exhaustion of all judicial avenues is, per se, an exceptional circumstance. Petitioners who seek this Court's review are almost always out of judicial alternatives because this Court is the ultimate court of last resort. As such, "exceptional circumstances," as defined by Petitioner, would almost always exist, but clearly do not on this basis alone. Consequently, there are no exceptional circumstances warranting the exercise of this Court's discretionary powers to issue an extraordinary writ.[2]

II. The Petition Improperly Requests This Court To Address Questions Which Were Not Timely Raised Below.

The traditional rule of this Court precludes a grant of certiorari when "the question presented was not pressed or passed upon below." *U.S. v. Williams*, ___ U.S.___, 112 S. Ct. 1735, 1738 (1992). The Petitioner's first question presented for review is whether the due process clause of the Fourteenth Amendment of the U.S. Constitution precludes federal courts from dismissing Petitioner's cause

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action under Title VII and antitrust laws were considered in the arbitration and decided against Petitioner, also as discussed below.

[2] Although not identifying Supreme Court Rule 10 as a basis for jurisdiction, it appears that Petitioner may have intended such jurisdiction. Consequently, even though no jurisdiction exists under Supreme Court Rule 20, Respondent will address this petition according to Rule 10 in the alternative.

of action without affording him an opportunity for a judicial hearing on the merits. (Pet. at i.) Petitioner contends that the due process requirements have not been fulfilled because "Petitioner received an arbitrary and capricious arbitration award in favor of NECEL. Such award was procured by undue means, witness perjury and, as being in manifest disregard of the law, abuse of discretion and evident partiality of the arbitrator." (Pet. at 12.) However, these arguments were not timely raised below, and they were not briefed or debated by the parties.

On December 28, 1992, Petitioner filed a *reply* brief with the court of appeals arguing that the confirmation of the "irrational" arbitration award and dismissal of Petitioner's action manifest injustice and deprive Petitioner of his due process. (Pet. App. E at 62a.) Petitioner based this due process argument on the same asserted facts supporting the present due process argument; namely, "the arbitration award is irrational and procured by fraud, undue means, manifest disregard of law, and evident partiality and misconduct of the arbitrator." *Id.* Respondent, however, objected to consideration of this claim, asserting quite correctly that it was wholly improper to raise such an argument for the first time at this late stage as Petitioner had done. (Res. App. 70-80.)

The Ninth Circuit responded to Petitioner's "due process" contentions by agreeing completely with Respondent, stating as follows:

> Finally, Nghiem argues that the arbitrator's decision was arbitrary and capricious. Not only was this argument not made in the district court, but Nghiem raises it for the first time in

> his reply brief. Nghiem now alleges witness perjury, procurement of arbitration award by undue means, arbitrator's manifest disregard of the law, and misconduct.
>
> We dismiss these arguments as untimely raised. An appellate court will dismiss arguments not raised at the district court, unless there are exceptional circumstances. *FSLIC v. Butler*, 904 F.2d 505, 509 (9th Cir. 1990). Nghiem does not even attempt to show exceptional circumstances.

(Pet. App. A at 10a-11a.) It is clear that Petitioner's due process arguments were neither passed on by the district court or the court of appeals, nor were they properly pressed by the Petitioner. As such, Respondent had no opportunity to brief or debate the issue below, and the court of appeals properly refused to consider it. Accordingly, the writ must be denied to the extent it seeks to raise these same issues now.

III. The Ninth Circuit Court Of Appeals' Decision In This Matter Fully Considered And Correctly Decided The Issues Based On The Federal Law And This Court's Prior Decisions.

A. The Ninth Circuit Court of Appeals Properly Affirmed The District Court's Confirmation Of The Arbitration Award Pursuant To The Federal Arbitration Act.

Nghiem's predominant contention at the district court and in his appeal to the Ninth Circuit was that he was not bound by the Arbitrator's decision because the Federal Arbitration Act ("FAA"), 9 U.S.C. sections 1-14,

requires an agreement to arbitrate to be in writing. 9 U.S.C. § 2. Petitioner relied on the fact that the employment contract which he signed does not contain an arbitration clause and that he refused to sign a proposed subsequent contract which included an arbitration clause. (Pet. App. A at 3a.) The Ninth Circuit rejected Nghiem's contention that NECEL forced him to pursue arbitration because that contention was inconsistent with his claim that he had consciously avoided signing an agreement which would require him to pursue arbitration. Therefore, the court upheld the district court's factual finding that Nghiem voluntarily initiated binding arbitration.

Nghiem argues that the arbitration could not be binding on him because the arbitration clause was not included in his employment contract. The Ninth Circuit correctly ruled that, while the FAA requires a writing, it does not require that the writing be signed by the parties. (Pet. App. A at 4a, citing, *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 846 (2d Cir. 1987).) The binding arbitration agreement was written in two separate sources: (1) the employee handbook, which Nghiem acknowledged receiving on September 5, 1989 and May 7, 1990; and (2) in a letter written by Nghiem to NECEL's Human Resources Director requesting to proceed with Step 4 of NECEL's problem resolution process. Step 4 expressly provided that: "The decision of the arbitrator will be final and legally binding on the company and the employee to the full extent permitted by law." (Pet. App. C at 15a.) Nghiem's request to pursue this process constitutes a written memorialization of his intention to submit to arbitration, as determined by the district court and the

Ninth Circuit Court of Appeals. (Pet. App. A at 4a; Pet. App. C at 16a.)

As an alternative, the court of appeals correctly concluded that the agreement to arbitrate could be implied from the conduct of the parties. (Pet. App. A at 4a-5a.) The court reasoned that Nghiem voluntarily initiated the arbitration, attended the hearings with representation, presented evidence, and submitted a closing brief of 50 pages. Despite the fact that Nghiem filed his state court suit prior to the announcement of the Arbitrator's decision, the decision was still binding because Nghiem submitted to the authority of the Arbitrator and pursued the arbitration. (Pet. App. A at 5a.) As the court of appeals accurately observed, it would have been unreasonable and unjust to allow Nghiem to participate in the arbitration process for several months and then challenge the legitimacy of the arbitration process shortly before the Arbitrator announced his decision. (Pet. App. A at 4a-5a, citing *Fortune Alsweet & Eldridge, Inc. v. Daniel*, 724 F.2d 1355, 1357 (9th Cir. 1983).)

Finally, the court of appeals correctly concluded that Nghiem's voluntary initiation of arbitration could be interpreted as a waiver of any objection he may have had over the authority of the Arbitrator. (Pet. App. A at 5a.) This is merely a reflection of the axiom that, whether a party may have refused to arbitrate an issue, when the party instead proceeds to arbitration, the party no longer has the right to raise the issue that its claim should not have been subject to binding arbitration. *Ralph Andrews Productions v. Writers Guild*, 938 F.2d 128, 130 (9th Cir. 1991); *Piggly Wiggly Operators' Warehouse, Inc. v. Piggly*

Wiggly Operators' Warehouse Independent Truck Drivers Union, Local No. 1, 611 F.2d 580, 584 (5th Cir. 1980).

Clearly, this application of the FAA and prior judicial authority are not in conflict with the decisions of other courts of appeal, nor do they involve an important federal question. Instead, it is clear that resolution of this case was dependent on the unique facts before the court; namely, Plaintiff's written request to voluntarily initiate Step 4 of the problem resolution process, including final and binding arbitration.[3] The Ninth Circuit identified

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[3] Petitioner contends that this Court should grant the petition in order to determine the meaning of the "contracts of employment" exception in 9 U.S.C. section 1. This argument was not presented to the district court or in Petitioner's moving papers to the court of appeals. In fact, Petitioner first presented this argument in his reply brief to the court of appeals, causing Respondent to object to its consideration for this reason. (Res. App. 77-78.) While the Ninth Circuit did not expressly address this objection, its decision also did not address Petitioner's argument in this respect, presumably relying on the rule that an appellate court will dismiss arguments not raised at the district court, unless there are exceptional circumstances. *FSLIC v. Butler*, 904 F.2d 505, 509 (9th Cir. 1990.) Nghiem made no effort to show exceptional circumstances on appeal, and likewise makes no attempt here. (Pet. App. A at 11a.) This Court is precluded from addressing questions which were not "pressed or passed upon below." *U.S. v. Williams*, ___ U.S. ___, 112 S. Ct. 1735, 1738 (1992). Since the applicability of the "contracts of employment" exception was neither pressed, passed upon nor debated below, certiorari must be denied. In any event, the FAA only excludes from its coverage contracts of employment for workers *directly* involved in international or interstate commerce. 9 U.S.C. § 1. This has uniformly been held to apply only to seamen and railroad workers or employees *actually* engaged in the movement of interstate or foreign commerce. *See, Tenney Engineering, Inc. v. United Electric Radio and Machine Workers*, 207 F.2d 450

three correct alternatives for enforcing the arbitration over Nghiem's protestations. Therefore, this writ should be denied, as review on such basis is completely unnecessary.

B. Arbitration Pursuant To The Federal Arbitration Act Is Appropriate For The Resolution Of Disputes Arising From The Alleged Antitrust Violations.

Petitioner contends that certiorari should be granted because of a purported conflict between decisions in the courts of appeals regarding the arbitrability of antitrust claims. (Pet. at 17.) This argument is not based on a conflict, but rather on the Ninth Circuit's decision to overrule *Lake Communications, Inc. v. ICC Corp.*, 738 F.2d 1473 (9th Cir. 1984) and, further, to refuse to follow the 1968 Second Circuit case, *American Safety Equipment Corp. v. J. P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968). (Pet. at 17.) Petitioner asserts that it is somehow erroneous for the Ninth Circuit to follow the holding of this Court's

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(3d Cir. 1953); *Hull v. NCR Corp.*, 826 F.Supp. 303 (E.D. Mo. 1993); *but see, United Electric, Radio & Mechanical Workers v. Miller Metal Products*, 215 F.2d 221 (4th Cir. 1954) (FAA may not be relied upon to compel enforcement of the arbitration clause in collective bargaining agreement.) The arbitration clause at issue here is not within a collective bargaining agreement, nor is Petitioner a seaman, railroad worker, or an employee actually engaged in the movement of interstate or foreign commerce. Thus, even if this issue had been properly raised below, it is clear that the exclusionary clause in section 1 of the FAA is not applicable to Petitioner.

decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 105 S. Ct. 3346 (1985), rather than inconsistent lower court decisions. However, the Ninth Circuit properly applied the rules set down by this Court in *Mitsubishi*.

Although *Mitsubishi* found "it unnecessary to assess the legitimacy of the *American Safety* doctrine as applied to a grievance to arbitrate arising from domestic transactions," it is clear that this Court's systematic demolition of the foundation of *American Safety* makes its continuing viability questionable, at best. 473 U.S. at 629, 105 S. Ct. at 3355. In *Mitsubishi*, this Court announced its "skepticism" of certain aspects of the *American Safety* doctrine," and refused to accept its holding that antitrust claims are not suited for arbitration. *Id.* After reviewing the policies and rationale which guided the Second Circuit in reaching its decision in *American Safety*, this Court concluded that the concerns expressed in *American Safety* were no longer valid. 473 U.S. at 632-640, 105 S. Ct. at 3356-3360.

Mitsubishi identified the four ingredients which compromise the *American Safety* doctrine:

> First, private parties play a pivotal role in aiding governmental enforcement of the antitrust laws by means of the private action for treble damages. Second, 'the strong possibility that contracts which generate antitrust disputes may be contracts of adhesion militates against automatic forum determination by contract.' Third, antitrust issues, prone to complication, require sophisticated legal and economic analysis, and thus are 'ill-adapted to strengths of the arbitral process, i.e., expedition, minimal requirements of written rationale, simplicity, resort to basic

> concepts of common sense and simple equity.' Finally, just as 'issues of war and peace are too important to be vested in the generals, . . . decisions as to antitrust regulation of business are too important to be lodged in arbitrators chosen from the business community – particularly those from a foreign community that has had no experience with or exposure to our law and values.' *See, American Safety*, 391 F.2d, at 826-827.

473 U.S. at 632, 105 S. Ct. at 3356-3357.

This Court in *Mitsubishi* then proceeded to specifically refute each ingredient of the *American Safety* doctrine. First, the *Mitsubishi* decision determined that the mere appearance of an antitrust dispute does not alone warrant invalidation of the selected forum on the demonstrated assumption that the arbitration clause is tainted. 473 U.S. at 632-633, 105 S. Ct. at 3357. To the contrary, the party resisting arbitration may attack the validity of the arbitration agreement or attempt to have the agreement set aside by showing: (1) fraud, undue influence, or overweening bargaining power; (2) that enforcement would be unreasonable and unjust; or (3) that proceedings in the contractual forum will be so gravely difficult and inconvenient that the resisting party will for all practical purposes be deprived of his day in court. *Id.* This Court thus concluded in *Mitsubishi*, in a manner entirely consistent with the court of appeals decision herein, that absent such a showing there is no basis for assuming the forum inadequate or its selection unfair.[4] *Id.*

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[4] Petitioner suggests that the court of appeals did not consider his contention that there was fraud in the inducement

Second, this Court in *Mitsubishi* also determined that potential complexity of antitrust issues should not suffice to ward off arbitration because "[t]he anticipated subject matter of the dispute may be taken into account when the arbitrators are appointed, and arbitral rules typically provide for the participation of experts either employed by the parties or appointed by the tribunal." 473 U.S. at 633, 105 S. Ct. at 3357.

Third, regarding arbitrator bias, this Court in *Mitsubishi* then took note that international arbitrators are frequently drawn from the legal and business communities, and refused "to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators." 473 U.S. at 634, 105 S. Ct. at 3357-3358.

Lastly, this Court addressed the "core of the *American Safety* doctrine – the fundamental importance to American democratic capitalism of the regime of the antitrust laws." 473 U.S. at 634, 105 S. Ct. at 3358. The private litigant's chief tool in the antitrust enforcement scheme

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relating to the arbitration provision. (Pet. at 14.) However, both the district court and court of appeals made a factual determination that Nghiem *voluntarily* initiated final and binding arbitration. (Pet. App. C at 16a-17a; Pet. App. A at 4a.) "A court of law, such as this Court is, rather than a court for correction of errors in factfinding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Goodman v. Lukens Steel Co.*, 428 U.S. 656, 665 (1987). A finding that Nghiem "voluntarily" initiated the arbitration precludes a factual determination that he was fraudulently induced to pursue arbitration.

and the primary deterrent to potential violators is the treble damages provision of the antitrust laws. The importance of the treble damages provision, however, does not compel the conclusion that it may not be sought outside an American court, "[a]nd so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral form, the statute will continue to serve both its remedial and deterrent function." 473 S. Ct. at 635, 105 S. Ct. at 3358-3359.

Any question as to the continuing validity of the *American Safety* doctrine has been dispelled by this Court's further statements in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S. Ct. 1647 (1991). This Court interpreted *Mitsubishi* broadly:

> It is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA. Indeed, in recent years we have held enforceable arbitration agreements relating to claims arising under the Sherman Act . . . . See, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S. Ct. 3346, 87 L.Ed. 2d 444 (1985); . . . .

111 S. Ct. at 1652. This point was reiterated: "the Sherman Act . . . [is] designed to advance important public policies, but, as noted above, claims under those statutes are appropriate for arbitration." 111 S. Ct. at 1653.

Finally, this Court has relied upon *Mitsubishi* to support the enforcement of arbitration agreements when a party bound by an agreement raises a claim founded on statutory right. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 107 S. Ct. 2332 (1987). In *McMahon*, the court of appeals distinguished this Court's

reasoning in *Mitsubishi*, concerning the arbitrability of antitrust claims, on the ground that it involved international business transactions and did not affect the law "as applied to agreements to arbitrate arising from domestic transactions." 482 U.S. at 224, 107 S. Ct. at 2336. This Court held "although the holding in *Mitsubishi* was limited to the international context, see *Id.* at 629, 105 S. Ct., at 3355, much of the reasoning is equally applicable here." 482 U.S. at 239, 107 S. Ct. at 2344. Applying the *Mitsubishi* analysis to domestic claims of violations of section 10b of the Securities and Exchange Act of 1934, 15 U.S.C. section 78j(b), and RICO, 18 U.S.C. section 1961, this Court concluded that a contractual provision providing for compulsory arbitration was enforceable under the FAA. 482 U.S. at 238, 242, 107 S. Ct. at 2343, 2346. Thus, the Ninth Circuit was correct in determining that the *McMahon* analysis, in combination with the FAA, *"can only mean* the judicially implied *antitrust exemption to the FAA no longer exists."* (Pet. App. A at 10a; quoting G. Richard Shell, *Res Judicata and Collateral Estoppel Effects of Commercial Arbitration*, 35 UCLA L.Rev. 623, 624 n.7 (1988) (citations omitted) (emphasis by 9th Cir.).)

Petitioner's real basis for seeking certiorari is not some unspecified conflict between the courts of appeals in different circuits, but rather that "both the district court and the Ninth Circuit overlook the very important fact that Petitioner's causes of action under antitrust laws was [*sic*] not ruled by the arbitrator." (Pet. at 17.) However, this clearly is not the case. Nghiem's arbitration complaint expressly submitted the antitrust claims to the Arbitrator. (Res. App. 19-21.) The Arbitrator's decision found that "Nghiem makes no argument with respect to his claimed

violations of anti-trust law by NECEL towards him. Accordingly, that claim is considered to be abandoned and will not be further discussed." (Res. App. 25.)

In fact, at the hearing, the Arbitrator informed Petitioner that he had the burden of establishing an antitrust violation. (Res. App. 5 at 83.) Further, the Arbitrator informed plaintiff "assuming that you prove all your facts, that's it on the – you do that if you want to pursue the antitrust claim." (Res. App. at 96.) Despite this warning, Petitioner did not prove any facts, or even argue such facts in his 50-page closing brief, relating to the antitrust claims. Therefore, the Arbitrator correctly concluded that Petitioner abandoned his antitrust claim. He may not resurrect it at this point.[5]

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[5] In any event, it is unnecessary for this Court to decide the issue of whether antitrust claims are arbitrable because the Petitioner neither has standing to sue nor has he alleged an antitrust violation. Since the proceedings below did not continue beyond confirmation of the arbitration award, this point was not raised or addressed by the lower courts. However, it is clear that, in order to have standing to assert an antitrust claim, Plaintiff must prove an antitrust injury; that is, an injury of the type the antitrust laws were intended to prevent and that flows from that which makes the Defendant's acts unlawful. 15 U.S.C. § 15; *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334, 110 S. Ct. 1884, 1889 (1990). Petitioner's Arbitration Complaint alleged Defendant's violations of antitrust laws were a "substantial factor in causing damage and injury to Plaintiff as set forth in paragraphs 18, 19 and 20." (Res. App. 21, ¶ 45.) Paragraphs 18, 19 and 20 seek recovery for emotional distress, punitive damages for Defendant's managers acting in a deliberate, cold, intentional and unfeeling manner in order to injure and damage Plaintiff, and treble damages for Defendant's employer's deliberate furnishing of incorrect information

CONCLUSION

This Petition must be denied. Petitioner has failed completely to establish an exceptional circumstance justifying issuance of an extraordinary writ pursuant to Rule 20 of the Supreme Court Rules. Petitioner's mere exhaustion of his judicial avenues certainly is not an exceptional circumstance warranting this Court's review. In addition, this Court should not consider Petitioner's due process argument or his contention that the arbitration is not enforceable under the FAA because these arguments were neither timely raised nor argued below.

For the issues which have been properly raised in the Petition, the Ninth Circuit Court of Appeals fully considered and correctly decided all such issues. No split among the lower courts on any legitimate issue raised in

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regarding the reasons for Petitioner's discharge, respectively. (Res. App. 14, ¶¶ 18, 19, 20.) Clearly, these are neither the types of injuries the antitrust laws were intended to prevent, nor are they the type of injury which flows from that which makes antitrust acts unlawful. Even if Petitioner had standing, his allegations, as a matter of law, cannot state an antitrust cause of action. An antitrust violation requires the existence of a contract, combination or conspiracy. 15 U.S.C. § 1. Independent action is not proscribed. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761, 104 S. Ct. 1464, 1469 (1984). However, Petitioner's Arbitration Complaint only alleges that "Defendant employer deliberately interfered with the COT business development," and there was a "conspiracy to secretly hamper the COT business development by Defendant employer . . . . " (Res. App. 19, 20, ¶¶ 40, 42.) Respondent's conspiracy with itself to interfere with its own business cannot support an antitrust claim. As a result, this case does not in any way adequately present any antitrust arbitration issues since Petitioner simply has no legitimate antitrust claim.

Petitioner's case has been identified. Finally, this case rests upon its own unique facts. Both lower courts made the factual determination that Petitioner voluntarily requested arbitration in writing and vigorously pursued the arbitration, including filing a 50-page closing brief. Petitioner only complained of the arbitration after the Arbitrator, considering all the evidence presented, ruled Petitioner's claims were entirely devoid of merit. Such factual circumstances simply do not raise any issues deserving of this Court's consideration through a writ of certiorari.

For these reasons, the Petition for Writ of Certiorari and/or an Extraordinary Writ should be denied.

DATED: November 11, 1994

Respectfully submitted,

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Plaintiff

AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration between Plaintiff: PETER NGHIEM vs Defendant: NEC ELECTRONICS INC.	Case No. 74-30-0287-90 COMPLAINT FOR DAMAGES 1. WRONGFUL TERMINATION 2. BREACH OF IMPLIED CONTRACT 3. BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING 4. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS 5. DEFAMATION AND CAREER DAMAGE 6. ANTITRUST VIOLATION

Plaintiff for his causes of action states:

FIRST COUNT: WRONGFUL TERMINATION AGAINST DEFENDANT NEC ELECTRONICS INC.

1. This is a complaint by plaintiff, a discharged former employee, against the ex-employer, NEC Electronics Inc., for damages arising out of the termination of employment. Plaintiff seeks compensatory and punitive damages.

2. At all times herein mentioned:

a. Defendant, NEC Electronics Inc., was and is a corporation with its headquarters in Mountain View, California. Its parent company, NEC (Nippon Electric Company) Corporation, has headquarters located in Tokyo, Japan. Defendant is in the business of manufacturing semiconductor products such as DRAM, ASIC gate arrays and standard cells, and microprocessors.

b. Each of defendants, Mr. Hiro Hashimoto, Mr. Grant Hulse and Dr. H. Yoshizawa, were and are managerial employees of NEC Electronics Inc.. Mr. Hiro Hashimoto was and is the ASIC General Manager, Mr. Grant Hulse was and is the ASIC Product Marketing Manager, and Dr. H. Yoshizawa was and is the National CAD Manager.

c. The term "defendant employer" will refer to defendant NEC Electronics Inc. acting by and through Mr. Hiro Hashimoto, Mr. Grant Hulse and Dr. H. Yoshizawa, and each of them, unless otherwise indicated.

3. Plaintiff, Peter Nghiem, was employed by NEC Electronics Inc. from August 31, 1989 to June 11, 1990 when he was fired allegedly on charges of insubordination, unsatisfactory work performance and unprofessional conduct. These charges were false, as will be described below.

4. Plaintiff were employed by defendant employer under an oral contract of employment as modified by certain policies, practices, assurances and other statements, both oral and in writing, of defendant employer. Plaintiff had a contract of employment for an indefinite term. As long as plaintiff performed his job satisfactorily, this indefinite term will continue. The term "at will" is not specified in plaintiff's employment contract which implies that discharge, if any, would only be for good cause proven. Therefore, plaintiff had an expectation of continued employment with discharge only for good cause based on the following:

a. Plaintiff signed the "Employment, invention and confidential information agreement with defendant employer on August 31, 1989 which does not specify his employment is "at will" (Exhibit S1).

b. Defendant employer published an employee handbook, a partial of which is attached hereto (Exhibit S2) and is incorporated by reference. Among other things:

(1) Page 1.4 of this manual stated " . . . we hire and reward outstanding people – team players with a can-do, customer first orientation." and "We believe in getting and rewarding results by recognizing achievement, basing advancement in the company on initiative, and demonstrated accomplishment."

(2) Page 1.5 of this manual stated "We also believe in the value of a responsive environment, one that respects personal dignity . . . We expext [sic] a great deal in return: simply your loyalty and your best,"

(3) Page 2.10 of this manual mentioned about the complaint procedure where "if you believe it would be inappropriate to discuss the matter with your supervisor, report it directly to the head of your department or to your Human Resources representative, who will undertake an investigation. Your complaint will be kept confidential to the maximum extend [sic] possible."

(4) Page 5.1 of this manual stated "NECEL is sincerely interested in your personal welfare and makes a great effort to be considerate and fair."

c. Defendant employer promulgated a written company problem resolution process which includes four steps to provide employee with four opportunities to review concerns with his immediate superior, with his functional vice president, with the Personnel Committee, and with an arbitrator (Page 5.2 to page 5.3 of the Employee Manual).

d. Plaintiff occupied a position of importance and responsibility. Plaintiff was a Senior Product Marketing Engineer with a title "COT/CAD Product Manager" in his business card (Exhibit 48). Plaintiff was given two important and major job assignments in COT business development and CAD strategic marketing management. In the second day on the job Plaintiff received the memo dated September 1, 1989 (Exhibit 18) from defendant employer which clearly specified his responsibilities as followed:

"Peter will have business development responsibilities for COT business. After analyzing our capabilities and the competitive environment, he will drive the development of a cohesive business plan for the US

market. He will coordinate the start of business action plans with each region's targets.

Peter will also have strategic marketing management responsibilities for all ASIC CAD products and relationships. This includes vendor relationships and joint programs, marketing strategies, CAD sales tools, merchandising, competitive analysis, CAD analysis of target accounts, etc."

e. In the first week of employment, defendant employer, in his presentation of the organization, verbally promised to promote plaintiff to either a Product Marketing Manager or a Regional Business Manager after plaintiff completes the first two assignments which were to promote the COT business development and CAD strategic marketing management.

f. Plaintiff received several oral commendations for his work performance and professional attitude in dealing with other people from defendant employer throughout the period of employment particularly in the first seven months. On several occasions defendants praised plaintiff for doing an excellent job in both the two assigned areas, CAD and COT strategic marketing.

g. Plaintiff received several written commendations for his work in the joint marketing activities and vendor relationships from different CAD vendors. A few samples of these written commendations are shown in Exhibit 34, 35, 36, 37, 38 and 39.

h. Plaintiff received good overall performance evaluations (Exhibit 28) although one part of the performance evaluation was rated below average on organizational and team relationship which contradicted with previous oral commendations from company management.

i. Plaintiff had a history of outstanding job performance from his previous positions at Raytheon Semiconductor Division, Fujitsu Microelectronics Inc. and Advanced Micro Devices. Plaintiff also received satisfactory and above-average performance evaluation from his present employer, Toshiba America Electronic Components, Inc. (Exhibit S3).

j. Plaintiff had a significant length of experience in product marketing of around three and a half years and had worked in the ASIC semiconductor industry for six and a half years.

k. Plaintiff had worked as a Senior Product Marketing Engineer since January of 1988 and held a BS degree in Electrical & Electronic Engineering and an MS degree in Engineering Management. Plaintiff had also done graduate work in Computer Engineering.

l. Plaintiff received specific assurances from his superior that the company intended to keep him on the job as long as he continued to perform satisfactorily. His superior also promised to promote him to a Product Marketing Manager or a Regional Business Manager after he completed the first two assignments. In [sic] several occasions, Plaintiff was told by his superior that he needed Plaintiff and wanted Plaintiff to stay in his group

to develop the COT business and CAD marketing activities when Plaintiff was thinking of moving to another group within the company.

m. In the ASIC Product Planning meeting in Japan on November 16, 1989, Plaintiff received a favorable response from the Product Planning and Business Development Committee for his COT Strategic Marketing Plan which also included CAD marketing and development strategies.

n2. Mr. T. Takai, CMOS Engineering Dept. Manager, and Mr. T. Takahashi, ECL Engineering Assistant Dept. Manager, who represented NEC corporate, suggested NECEL to send two resident US engineers to NEC Tokyo for IC process technology training in order to support COT business in the US. The Product Planning committee also agreed to assign an engineering manager in Japan to work full time on the COT project to support US customers.

m2. A few weeks after the Product Planning Meeting on November 16, 1989, defendant employer, Mr. Hiro Hashimoto, told plaintiff that he would requested [sic] NEC Corporate to send two resident Japanese engineers to the US to provide COT technical support instead of sending US engineers to Japan for training for this purpose. He also stated that one of the candidate [sic] will translate japanese [sic] documents into english [sic] in order to set up a technical data base to support COT customers as part of the COT business development plan proposed by plaintiff.

(1) Mr. Hashimoto had several times told plaintiff before and after the Product Planning meeting in

Tokyo that a COT engineering group would be formed and managed by Mr. Kevin On, Western Design Center Manager, to provide technical support to US COT customers. Mr. Kevin On denied any of such assignment and confirmed that he was only responsible for one particular COT customer in the region.

(2) Early in March of 1990, plaintiff was told by both Mr. Hashimoto and Mr. Hulse that Mr. K. Endo, from NEC Corporate in Tokyo, is assigned to NECEL as a technical liaison person to request technical information from Japan and prepare technical documentation for COT customers. Plaintiff went to Mr. K. Endo to request COT support and found out that Mr. K. Endo did not know anything about this COT assignment. Furthermore, Mr. K. Endo informed plaintiff that he was assigned to work full time on the CAD project only.

(3) Plaintiff had made several trips to Roseville plant to gather information on pricing, contract and process engineering support for COT business. He was assigned to generate COT pricing by his superior but he encountered unreasonable obstruction from Mr. Hideto Goto when he asked him for information on process technology and manufacturing cost such as wafer process yield and cost, test and assembly cost, wafer and assembly capacity and overhead cost in order to generate the die price matrices with price adders for different packages for different process technologies available at Roseville manufacturing plant. Mr. Hideto Goto was assigned as the focal point of contact in Roseville for COT process engineering support. Apparently, COT customers had problems in getting technical information and support from Mr. Hideto Goto.

(4) Up to the time that plaintiff was discharged from the company on June 11, 1990, there was no engineer officially assigned to support COT customers. Plaintiff with the support of field sales personnel identify [sic] several COT design opportunities which were eventually turned down by defendant employer who did not set up the engineering support system as promised and refused to take the business by not providing necessary technical information.

(5) Plaintiff learned from the business records and co-employees that the COT business development was originally assigned to the former ASIC Assistant General Manager, Mr. R. Johnson, who was a former Vice President or Director of marketing at NCR. Mr. R. Johnson left NEC Electronics Inc. and went back to NCR after he spent around a year at NEC trying to promote the COT business activities without any success. Plaintiff joined NEC Electronics Inc. after Mr. R. Johnson had left and accepted the COT assigment [sic] as half of his responsibility. Within a short period of time, plaintiff successfully promoted the COT business development after he obtained a favorable acceptance of his COT/CAD Strategic Marketing Plan by the Product Planning Committee of NEC. The implementation of the first few steps of the COT business plan brought in several COT design opportunities. Around 18 COT customers with several COT design opportunities were identified and presented to NECEL's ASIC management who refused to take the business and frustrated prospective customers in the technical inquiry process.

n2. Right after plaintiff joined NEC Electronics Inc. with the assignment of CAD strategic marketing

management, he found out that the company was experiencing a major problem in the layout of gate arrays and standard cells which required the proprietary "place and route" software to be redeveloped from scratch in order to improve the routability percentage. These problems had great impact on the booking and development of gate array designs while the company got an extremely poor design win ratio in standard cell. NEC had generated around 60 standard cell quotes in the US for zero design win since the company did not have adequate CAD development tools for standard cell design.

(1) Plaintiff proposed the adoption and integration of third party US CAD vendor tools to NEC CAD design system to substitute inefficient proprietary CAD tools in his strategic marketing plan. Instead of redeveloping the layout software and several other CAD development tools from scratch internally, NEC decided to acquire CAD tools from US CAD vendors and integrate them to NEC CAD design system throughout the organization and worldwide.

(2) In December of 1989, plaintiff suggested to Dr. H. Yoshizawa to send out a Request For Proposal to three different CAD vendors to ask for information and proposal on IC CAD layout tools. This RFP led to a major CAD tool evaluation process of around three months performed by NEC Electronics Inc. with different US CAD vendors, a major joint CAD development project and a corporate wide technology partnership agreement with Cadence.

(3) Plaintiff and Mr. Ernie Frolichman, Senior Staff Contract Administrator, led the contract development and negotiation team to work on the terms, conditions and pricing of the technology partnership and production purchase which had a total value of around $20,000,000.00. Plaintiff also worked on other purchase contracts with Mentor SDD and Synopsys.

o. Until the events described below, plaintiff had not received any significant criticism. However, plaintiff did not get much support from employer management for the work he was assigned to do, particularly the promotion of COT marketing, sales and technical support activities. On the other hand, his superior coninued [sic] to attempt to take away his CAD projects when they were completed without proper notification.

5. On March 26, 1990, plaintiff received the performance evaluation which rated plaintiff above average in accountability and objective accomplishment. The performance job-related behavior was also rated from average to above average except the organization and team relationship skills. Since some of the reprimanding comments and examples stated in the performance evaluation contradicted with the actual facts, plaintiff told his superior that he did not agree with them and would respond to the unfair performance evaluation.

6. In April of 1990, plaintiff contracted Mr. Denny Mitchell, Director of Human Resources, for advice and was told to submit his complaint in writing so that personnel department could investigate the case.

7. On May 9, 1990, plaintiff submitted a written complaint to Mr. Denny Mitchell who, several days after

that, had to leave for a business trip in Japan. Before Mr. Mitchell left for Japan, he informed plaintiff that Mr. Hiro Hashimoto would facilitate a three way meeting to resolve the disputed issues and strengthen the teamwork spirit in his group. This three way meeting did not happen as noticed.

8. On May 24, 1990, without any warning at around 4:30 PM, Mr. Grant Hulse called plaintiff to a conference room in the front lobby for a private meeting. In this meeting, defendant employer tried to instigate an argument with plaintiff by brutally and falsely accusing him of taking compensation time and vacation time, and assigning meeting coverage to a peer without obtaining permission. One hour later at 5:35 PM, plaintiff found the first written warning and a notice for a meeting with personnel arranged by Mr. G. Hulse, left on his chair.

9. On May 31, 1990 in the meeting with Mr. Dave Nieto, Manger of Compensation and Benefits, and Mr. Hiro Hashimoto, Mr. Grant Hulse went through the list of fictitious incidents (Exhibit S4) quoted in the Termination Notice and falsely alleged that plaintiff was insubordinate, inefficient in his work performance and unprofessional in his conduct. In this meeting plaintiff was asked extensive questions but he was not allowed to respond with a complete answer.

10. On June 11, 1990, without warning, plaintiff was asked to go to a private meeting in the conference room in the front lobby where defendant employer asked plaintiff to resign. Plaintiff refused to resign and therefore, received a written termination notice which was effective

immediately. The reasons for discharge in the Termination for Cause memorandum dated June 11, 1990 were proved to be unwarranted and have no basis in facts in the light of substantial evidence (Exhibit S4). In these fictitious incidents, defendants conspired to humiliate, harass and intimidate plaintiff.

11. The actions of the above-said defendants violated company written policies which was [sic] described above in paragraph 4. Plaintiff was given the first warning right before he left for vacation and the warning itself is based on false and untrue incidents. There was no investigation of any charges against plaintiff. And plaintiff did not have the opportunity to present evidence. The company Problem Resolution Process provides employee [sic] with four opportunities to review concerns. But in this case, defendant employer fired plaintiff right at the first step. Apparently, the company did not treat plaintiff in a fair and honest manner and had furnished incorrect information in the Termination Notice regarding reasons for discharge.

12. After being wrongfully discharged, plaintiff has exhausted all administrative options to try to get the problem resolved following the four steps of company's Problem Resolution Process.

13. Employer rejected plaintiff's complaint at all three steps of the Problem Resolution Process without given [sic] any explanation and justification. In addition, the company specifically violated its own policies when it did not respond to plaintiff in a timely manner. Plaintiff did not received [sic] the response from the Personnel Committee at step 3 until 7 weeks after he submitted his

complaint letter. Furthermore, the response from the Personnel Committee was dated August 20, 1990 which was 4 weeks after submission date instead of 10 working days as specified in the company Problem Resolution Process.

14. Defendant employer took a further step to successfully deprive plaintiff of his unemployment insurance benefits, the only source of temporary income that plaintiff desperately needed and depended upon during the period of 19 weeks looking for another job. Plaintiff had to live on his retirement fund and money borrowed from his relatives.

15. Plaintiff was forced to seek employment for 19 weeks and accepted a job with a company in [sic] October 23, 1990 that cannot offer him comparable job position and comparable salary. Had he remained with NEC Electronics Inc., he would have been promoted to a Product Marketing Manager or a Regional Business Manager position after he completed the first two assignments as promised by his superior. Plaintiff had to accept a Junior Product Marketing position which was a career set back of over four years.

16. The above said acts of defendant employer constituted a wrongful termination of plaintiff which was a substantial factor in causing damage and injury to plaintiff as set forth below.

17. As a result of the foresaid acts of defendants, plaintiff has lost income and benefits, and will continue to lose income in an amount to be proven at time of hearing. Plaintiff claims such amount as damages together with prejudgment interest pursuant to Civil

Code Section 3287 and/or any other provision of law for prejudgment interest.

18. As a result of the aforesaid acts of defendants, plaintiff has become mentally upset, distressed and aggravated. Plaintiff had to take a psychotherapy [sic] under the prescription of a licensed psychologist to cure his mental distress and aggravation. Plaintiff claims general damages for such mental distress and aggravation.

19. Since employer managers acting [sic] in a deliberate, cold, intentional and unfeeling manner in order to injure and damage plaintiff, plaintiff requests an assessment of punitive damages against defendants..

20. Defendant employer who deliberately furnishes incorrect information regarding reasons for discharge of plaintiff, is also liable in tort for treble damages.

SECOND COUNT: BREACH OF IMPLIED CONTRACT AGAINST DEFENDANT

21. The allegations of paragraph [sic] 1 through 15, inclusive, are incorporated by reference.

22. Defendant expressly and impliedly led plaintiff to an expectation of continued employment through the job assignment and future promised position when the first two assignments were completed.

23. Plaintiff and defendant employer signed the "Employment, invention and confidential information agreement" which does not specify plaintiff employment is "at will".

24. The practice of the industry and the personnel policies and practices of employer as a giant japanese [sic] company reflect assurance of continued employment. Therefore, there exists an implied-in-fact promise for some form of continued employment. This independent consideration together with the promise of promotion and long term career growth within the company by defendant employer are sufficient to support a promise of job security.

25. Defendant employer acted in bad faith and committed the tort of wrongful discharge of employment when defendant impliedly led plaintiff to expect a continuing and long term employment, and then discharged plaintiff with fictitious reasons.

26. The above said acts of defendant employer constituted a breach of implied contract which was a substantial factor in causing damage and injury to plaintiff as set forth in paragraphs 18, 19 and 20.

THIRD COUNT: BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING AGAINST DEFENDANT

27. The allegations of paragraphs 1 through 15, inclusive, are incorporated by reference.

28. The covenant of good faith and fair dealing requires that the employer can only discharge employee for good cause if an employee has an expectation of continuing employment. The causes for discharge in this case have been proven to be unwarranted and have no

basis in facts. Defendant employer who terminated plaintiff without good cause is liable for the tort of bad faith discharge.

29. The law of the State of California implied a covenant of good faith and fair dealing in the relationship between plaintiff and defendant employer. This covenant required that each party to the employment contract acts with fairness and good faith toward the other, and that neither party should take any action to prevent the other from receiving the benefits of the relationship.

30. The above said acts of defendant employer constituted a breach of covenant of good faith and fair dealing which was a substantial factor in causing damage and injury to plaintiff as set forth in paragraphs 18, 19 and 20.

FOURTH COUNT: INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AGAINST DEFENDANTS

31. The allegations of paragraph [sic] 1 through 15, inclusive, are incorporated by reference.

32. Several incidents in Exhibit S4 where defendant employer, acting through defendants, deliberately and intentionally inflicted serious emotional distress against plaintiff. Defendant employer had approved the vacation and compensation time request and then falsely accused plaintiff of not obtaining permission. Defendant employer held weekly meetings with plaintiff in [sic] April 20, 1990 and May 4, 1990, and sent plaintiff to an offsite meeting in Roseville on April 27, 1990, and then falsely accused him of failing to attend the weekly meetings in those weeks. Defendant employer demanded

plaintiff to attend the CAD meeting on May 17, 1990 and gave him permission to present the CAD strategic marketing materials, and then falsely accused him of attending the meeting without permission and altering the agenda to force a personal presentation. Defendant employer instigated an argument with plaintiff on May 16, 1990 at the CICC show and on May 24, 1990 in a private meeting, and then falsely accused plaintiff of doing so. . . .

33. The above said acts of defendant employer constituted an intentional infliction of emotional distress against plaintiff which was a substantial factor in causing damage and injury to plaintiff as set forth in paragraphs 18, 19 and 20.

FIFTH COUNT: DEFAMATION AND CAREER DAMAGE AGAINST DEFENDANTS

34. The allegations of paragraphs 1 through 15, inclusive, and 32 are incorporated by reference.

35. Defendant employer falsely accused plaintiff of insubordination and unprofessional behavior, and then spread the rumors that greatly affected plaintiff's career at prospective employers when plaintiff was looking for a job and at his new company, according to the notice of other workers, information and belief of plaintiff.

36. Defendant deliberately committed to the above said acts with a clear intention to injure and defame the good name of plaintiff.

37. Plaintiff was forced to have a set back in his career to accept a lower position as a Junior Product

Marketing Engineer in the tactical marketing area instead of strategic marketing. Plaintiff was set back by around four years in his career path while any future promotion was questionable due to the defamation. Plaintiff has lost substantial benefits and future promotional opportunities that do not exist in his new job.

38. Plaintiff's inability to receive job satisfaction, which helped him in the past, has resulted in his feeling a total lack of sense of purpose and uncertainty in the new work environment.

39. The above said acts of defendant constituted a defamation of plaintiff which was a substantial factors [sic] in causing damage and injury to plaintiff as set forth in paragraphs 18, 19 and 20.

SIXTH COUNT: ANTITRUST VIOLATION AGAINST DEFENDANT

39. The allegations of paragraphs 1 through 15, inclusive, are incorporated by reference.

40. Defendant employer deliberately interfered with the COT business development to support COT customers in the US by obstructing the technical information transfer from NEC Corporate in Japan to NECEL in the US. Defendant employer hampered the formation of the COT technical support group in the US particularly at the domestic manufacturing facility in Roseville in order to restrict production and control prices. The Roseville production capacity is controlled by the availability of lead-frame, molding compound materials and special assembly equipments. Premium technologies requested

by COT customers are not available at the local manufacturing plan [sic] while the process technology information necessary for COT design are [sic] tightly controlled by NEC Tokyo.

41. Under Sherman Acts, unreasonable restraints of trade are illegal per se restraints interfering with free competition in business and commercial transactions which tend to restrict production, affect prices, or otherwise control market to detriment of purchasers.

42. Plaintiff was formally hired to set up the COT business support system and promote the COT business development activities. However, there was a conspiracy to secretly hamper the COT business development by defendant employer and hire plaintiff as a "scapegoat" to be responsible for the project without getting any support from employer ASIC management, particularly at the implementation stage of the business plan.

43. Defendant employer was surprised to receive the comprehensive COT Strategic Marketing Plan prepared by plaintiff after he had taken away the allocated marketing assistance time in capturing the presentation materials using the Macintosh. In addition, defendant was reluctant in allowing plaintiff to present and distribute the COT Strategic Marketing Plan materials to the Product Planning Committee on November 16, 1989.

44. The promise of having adequate engineering resource allocated to support COT business did not happen over the period plaintiff was employed by NEC Electronics Inc. Plaintiff believes that nobody was assigned to take over the COT strategic marketing position to carry out the COT business development plan

after plaintiff was discharged. The termination of employment of plaintiff appears to be an excuse to further hamper the COT business development and cover up the conspiracy since plaintiff requested an investigation of the unusual lack of support to promote the COT business from NECEL ASIC management.

45. The above said acts of defendant constituted a violation in antitrust law which was a substantial factor in causing damage and injury to plaintiff as set forth in paragraphs 18, 19 and 20.

WHEREFORE, plaintiff seeks judgment against defendants, and each of them, for all actual, consequential and incidental losses, including but not limited to loss of income and benefits, according to proof, together with prejudgment interest pursuant to Civil Code Section 3287 and/or 3288, and for general damages and punitive damages from all six counts, such other and further relief as the arbitrator deems proper.

Executed on February 7, 1991, in San Jose, California.

/s/ Peter P. Nghiem
PETER P. NGHIEM

In the Matter of an Arbitration between PETER NGHIEM, Complainant, and NEC ELECTRONICS, INC. Respondent. Re: AAA 74-30-0287-90	OPINION AND DECISION of JOHN KAGEL, ARBITRATOR November 18, 1991 San Francisco, CA

INTRODUCTION AND ISSUE:

This arbitration case is pursuant to NEC Electronics, Inc., "Policies Procedures Guidelines No. 4-304, subject: Problem Resolution." As a final step of this corporate problem resolution procedure, a matter which has been theretofore unresolved may be submitted to arbitration before a mutually selected impartial arbitrator. Employees may request arbitration of complaints related to termination of employment (NEC Exhibit L10034).

The Company maintains that the termination of Peter Nghiem is in accordance with his employment contract and, therefore, Nghiem should take nothing from these proceedings.

Nghiem's contentions are set forth in a complaint for damages Exhibit S-0 pages 1-121 under the following broad categories: wrongful termination, breach of implied contract, breach of covenant of good faith and fair dealing, intentional infliction of emotional distress,

defamation and anti-trust (Tr. 6-7). A copy of that complaint is attached hereto and incorporated herein as Exhibit A.

AMERICAN ARBITRATION ASSOCIATION PROCEDURES:

Nghiem alleges violation of American Arbitration Association Rule 45, "Communication with Arbitrator" which provides there be no communication between the Parties and the neutral arbitrator other than at oral hearings and any other oral or written communications are to be directed to the AAA for transmittal to the arbitrator. Nghiem cited three letters from the Company dated October 18, 1990, November 20, 1990 and September 24, 1991 as violations of this rule.

The first two letters occurred prior to the retention by NEC and Nghiem of the AAA to administer the case. Prior to the AAA's handling of the case it was being administrated through the arbitrator's office. A letter dated November 27, 1990, specifies that date as the one on which the American Arbitration Association administration of the case began.

Neither the 1990 letters nor the letter of September 24, 1991 are substantive to the decision herein in any respect. Consequently, the fact that these letters were sent to the arbitrator directly, as opposed to through the AAA, are immaterial, of no consequence, and have played no part in the ruling in this case. Those letters are attached hereto and incorporated herein as Exhibit B.

EMPLOYMENT CONTRACT:

The Grievant's Employment, Invention and Confidential Information Agreement was signed by him on August 31, 1989. Paragraph 9 thereof reads:

> "9. I understand that nothing set forth in this agreement shall prevent or limit my right to terminate my employment at any time for any reason. And I understand further that nothing set forth herein shall prevent or limit the Company from terminating my employment at any time for any reason, unless I enter into a separate written employment agreement ("contract of employment"), signed by an officer of the Company, which sets forth specific terms regarding the period of my employment or termination of said employment." (NEC Ex. L10001, Nghiem Ex. S-1).

NOTICE OF TERMINATION:

By memo, dated June 11, 1990, from Grant Hulse, the Complainant's Supervisor, titled "Termination for Cause", the Grievant was terminated. That document is attached hereto and incorporated herein as Exhibit C.

DISCUSSION:

Complainant's Job:

Nghiem was hired as a Senior Product Marketing Engineer with a salary of approximately $57,000.00 per year (NEC Ex. L10005) on August 31, 1989. On September 1, 1989, Hulse summarized Nghiem's job responsibilities as follows:

> "Peter will have business development responsibilities for COT [Customer Owned Tools] business. After analyzing our capabilities in the competitive environment, he will drive the development of a cohesive business plan for the US market. He will coordinate the "start of business" action plans with each region's target.
>
> Peter will also have strategic marketing management responsibilities for all ASIC [applications specific integrated circuits] CAD [computer aided design] products and relationships. This includes vendor relationships and joint programs, marketing strategies, CAD sales tools, merchandising, competitive analysis, CAD analysis of target account, etcetera." (Nghiem Ex. 18).

These duties were subject to change in the future. Nghiem's business card identified him as "COT/CAD Product Manager" but that title did not "imply Management level fringe benefits" (NEC Ex. L10005).

Anti-Trust:

In his brief, Nghiem makes no argument with respect to his claimed violations of anti-trust law by NEC towards him. Accordingly, that claim is considered to be abandoned and will not be further discussed.

Standard to be Applied:

While NEC has contended that Nghiem's contract with it is an "at will" contract as paragraph 9 thereof suggests, NEC nonetheless maintains that it terminated Nghiem for cause (see termination letter). At the hearing

the Company stated it was willing to stand by the reasons given for Nghiem's termination and prove its case (Tr. 162). Accordingly, for the purposes of this case, the determination to be made is whether or not there was cause for the Complainant's termination.

Grounds for Termination:

It is unnecessary to detail all of the grounds for termination. There are three broad categories alleged: insubordination, unsatisfactory work performance, and unprofessional conduct. Major grounds for termination will be discussed below.

Insubordination: Failure to Meet Weekly:

One-on-one weekly meetings which were supposed to be on Fridays at 4:00 p.m. were mandated by Hulse in the Complainant's Performance Planning Evaluation and Review that he received dated March 26, 1990. That review is part of the Termination Notice attached hereto. The purpose of that meeting, as stated in NEC Exhibit L10022, was to improve communication between Nghiem and Hulse (Tr. 181-182). While Nghiem maintains that the schedule for these meetings were informal, that the meetings were not concerned totally with the question of communication or interpersonal relations, he did testify that that subject was occasionally talked about at several of them. Hulse's testimony is accepted that there were several instances where Nghiem did not do anything to either attend or reschedule such meetings. His failure to do so was insubordinate.

Insubordination: ACE Conference:

Of greater importance with respect to insubordination is the claim concerning the ACE (Advanced CAD Environment) meeting. That conference was an international meeting set for May 16, 1990. Hulse was assigned to set the agenda for that meeting. He scheduled a time slot for the Complainant to talk about a specific contract with another company, Cadence, which was important to the project being discussed and which Nghiem was negotiating. On May 8, 1990, Hulse gave a preliminary agenda to Nghiem and to ASIC managers. According to Hulse, Nghiem was critical of the agenda. He wished to give his own personal view of ACE in a separate presentation. He stated that he, rather than Hulse, should present the United States vision of what the ACE project was to be. Hulse advised Nghiem that he, not Nghiem, was to give that presentation.

Nghiem also stated that he felt that the Cadence contract negotiation subject been assigned was not worth the one and a half hour's [sic] scheduled for it, in that it would be boring if it was of such length. Hulse suggested that the Cadence negotiations then be included in the regular business items and it be discussed by Nghiem. At the end of the meeting, Nghiem still insisted that his own overall presentation should go forward, which Hulse again refused to allow. Nghiem then said he would get his ideas together and would present some customer CAD profiles. The two agreed that they would discuss the matters Nghiem would present at their regular 4:00 p.m. Friday, one-on-one meeting on May 11, according to Hulse.

On May 11, Hulse rewrote the ACE agenda removing Nghiem's one and a half hour presentation. Nghiem did not come to the 4:00 p.m. meeting but returned to the office close to 5:00 p.m. He stated that he had been tied up with CICC trade show matters which was due to start the next day in Boston. Hulse stated he needed to meet with Nghiem at that point because he had updated the ACE agenda. Nghiem stated he had no time and asked if he could get back to Hulse and discuss the matter at the CICC which Hulse stated would be all right. Hulse, however, was getting concerned so he checked with the person who does Macintosh presentations for meetings who stated that Nghiem had not yet given her anything but that he was due to fax her something to prepare for the ACE meeting (Tr. 196, NEC Ex. L10127).

In Boston the day before the ACE meeting, Hulse went to Nghiem and told Nghiem he wanted to sit down and talk about the ACE meeting. Hulse showed Nghiem the latest agenda with Nghiem's name no longer on it. Hulse described Nghiem's reaction as "very predictable, surprised, angry, shock." Nghiem began to write down the words that Hulse used (Tr. 198). Nghiem stated "Oh, this is great, we are investigating you. You are going to get canned. Keep talking. I write it all down." (Tr. 199).

Hulse told Nghiem that his superior, Hashimoto, had assigned him to chair the ACE meeting; that he had been given the project as a project leader and that Nghiem could not present his views without Hulse's permission. He did not want Nghiem to show up at the meeting with a different direction to embarrass him or his manager. Nghiem told him "You have a problem" (Tr. 199). Hulse testified he understood this to mean Hulse was using

Nghiem's work but was trying to take the glory for it. Nghiem suggested Hulse was under investigation by NEC Human Resources and he would soon be unemployed. Hulse told Nghiem he had a problem and that if Nghiem's behavior did not change he could not see Nghiem working there another month (See also NEC Ex. 10128-29).

Two hours later Hulse went back to reexplain the situation but Nghiem said he was too busy to talk with Hulse. Hulse told Nghiem he would make himself available the following morning in Mountain View and told Nghiem unless he came to see Hulse he did not want Nghiem to attend the ACE meeting. The reason why Hulse wanted to see Nghiem in advance of the meeting was to go over the material Nghiem was to present.

Hulse was in his Mountain View office at 5:30 a.m. and the ACE meeting began at 8:30. Nghiem did not come to see Hulse and he was not at the ACE meeting when it started. At 10:15 he entered the room after earlier having the Macintosh operator put together a presentation for him. Shortly before noon when the meeting session was just about to close to move to the business session, Nghiem raised his hand and stated that he needed to give a presentation, that he had some important things that had to be discussed. To avoid embarrassment, Hulse asked the attendees if that was all right with them. They all agreed to hear Nghiem's presentation as long as it was made during lunch, which it was. The Complainant presented his ideas about the marketplace. In Hulse's view it added nothing relevant to the meeting, but it did not embarrass anyone either (Tr. 204). What was presented had little to do with Nghiem's original assignment (Tr.

543, 545-546). Both Hulse and Hitashi Yoshizawa testified that Nghiem's presentation was professionally done.

Nghiem presented no substantial evidence to contradict Hulse's testimony.

Nghiem did not present Hulse with any material as was reasonably requested by Hulse who was chairing the meeting, he in effect, threatened Hulse with respect to taking him before the Human Resources division of the Company for some form of unspecified misconduct when Hulse was attempting to reasonably carry out his duties, and he appeared at, interrupted and made a presentation before the meeting when he was specifically told he was not to do so because he would not disclose what he planned to present. His actions were a clear and utter disregard of Hulse's authority and was clearly insubordinate. His actions were a willful breach of his employment obligations as a professional employee. Nghiem's contentions in his brief, that he, in fact, presented what he was going to discuss at the ACE meeting to Hulse as early as May 4, neither establishes that he had (See Nghiem Ex. 21B), nor that it met Hulse's proper needs with respect to information about what Nghiem was to do at the meeting. The fact that Hulse may have seen material which could have been presented, but which he did not know would be presented at some point in the past, did not meet the Complainant's ACE meeting obligation. Hulse's testimony is credible, contrary to Nghiem' [sic] contention. The fact that Hulse or others did not act embarrassed because of Nghiem's asking to make a presentation, which he had never been invited to give, does not excuse his conduct. Similarly, that he gave his presentation in a professional manner also does not do

so. The fact was he was not supposed to come to the meeting at all. He did, and then he compounded his misconduct by making a presentation that he had not cleared in advance with Hulse. Nghiem maintains that the change of agenda, Hulse's initiation of conversation on the CICC floor, and the sending out of a new agenda Nghiem had not seen reveals Hulse's motive and rationale. Yet, as Nghiem suggests, such questions "should not be confused with the acknowledged right of Management to conduct their business and make decisions" (Nghiem Brief, p. 21). Hulse, in fact, was conducting the Company's business and was making appropriate decisions. Nghiem acted contrary to that conduct of business and in doing so was clearly insubordinate as alleged.

Insubordination: May 24 Warning:

Hulse also established that the Complainant walked out of a meeting on May 24, 1990, which led to the Complaint's written warning when Hulse directed that he [sic] not to do so. Nghiem presented no substantive defense to that testimony.

Similarly, the May 24 action of walking out of a meeting with Hulse when Hulse ordered him not to do so was also insubordinate.

Unprofessional Conduct: Characterization of Hulse:

With respect to the unprofessional conduct about which the Complainant was accused, it was essentially uncontradicted that at a meeting called by Human Resources as a "resolution meeting" on May 31, 1990, Hulse and Nghiem were invited to each state their views.

Nghiem attacked Hulse's integrity, professionalism, and called him a liar (Tr. 90-91). After being cautioned concerning his conduct, Nghiem, after a period of time, again raised his voice and accused Hulse of having less than ethical standards.

Nghiem did not deny that he used such language. Rather he characterized the meeting as being intentionally inflammatory so that he would react in the way that he did (Brief p. 37). The testimony does not show that the conduct of the meeting was such that would provoke the name-calling by Nghiem. In fact, in a written memo to Human Resources dated May 9, 1990, Nghiem had already accused Hulse of "dishonest actions." He pointed out that Hulse, as a manager, contrary to what Nghiem believed was occurring, must be an "ethical example" for others (Nghiem Exs. 17C, 17D). Therefore his choice of words on May 31, 1990 were hardly originally incited at the meeting by Hulse or others. The Complainant was given an opportunity to state that which he wished to state and was invited to remain on the issues which were being discussed. The purpose of the meeting was to reconcile the parties and resolve their problems, as opposed to creating greater confrontation. Accordingly, Nghiem's unprofessional conduct on that date was established.

Unsatisfactory Work Performance:

With respect to unsatisfactory work performance, in his performance appraisals Nghiem's ratings were high in many respects but low in others. With respect to CAD vendor relationships Nghiem specifically contested that

his 2.5 rating appraisal was not appropriate. Yet, that there was a need for the Complainant to improve his communication problems was established in this record. Particularly they were established with respect to communications between Hulse and Nghiem after Hulse was critical of Nghiem in some aspects of his job in the performance appraisal. There was no recognition by Nghiem of the high ratings that he received except that he felt that he was being ranked too high. Nghiem was aware that at least one Employee, Moises Hernandez, had felt that there were difficulties with respect to communication. Hulse had received complaints from others as well. On receiving the performance appraisal, rather than using the opportunity to respond in a constructive way or to file appropriate rebuttals if necessary, with respect to the CAD vendor issue, which he felt was misrepresented, Nghiem conducted himself in a particularly negative fashion. Nghiem's memo in response to his appraisal to Human Resources was short on specifics but long on Nghiem's general views of Hulse's managerial shortcomings (Nghiem Ex. 17A-F). As Hulse pointed out, it was from the time of the performance appraisal onwards that the relationship between Nghiem and Hulse deteriorated, resulting in the kinds of conduct already described above.

Conclusions as to Charges:

The conclusion from the foregoing necessarily is that there was ample evidence of just cause for the termination of the Complainant. Nghiem had been warned about his misconduct, yet he persisted in it. As stated in the written warning (NEC Ex. L10026) in describing walking

out of the meeting when items critical to Nghiem were being discussed, even after being told he would be written up formally if he did so, Hulse wrote, "The real problem is Issue 3. The general insubordination on top of the lack of communication. If this type of behavior continues, I will recommend to ASIC Management and Human Resources that further action be taken which may include termination of employment with NEC." Nghiem did continue such actions on May 31. His termination was for cause. For the reasons stated above the evidence sustains the serious incidents cited with respect to his termination.

DEFENSES:

The Claimant's major defense is that he was a highly successful employee of the Company, and was so successful that others, including Hulse, sought to discredit and then terminate him so that they could receive the credit and glory that the Complainant, rather than they, achieved. The Complainant dwelt on this defense to the virtual exclusion of any defense of many of the actions that he was specifically accused of. He justified his approach on the basis that he was being set up; that his areas of assignment, particularly COT, were specifically denied support even after Japan had enthusiastically endorsed them; that Hulse deliberately refused to communicate changes in job and work assignments with him; that, therefore, the Management both created incidents to provoke the Claimant or cited matters which were simply pretenses to terminate him. As stated in Nghiem's brief, "It is of course recognized that Management can easily

assert that this is nothing more than Nghiem's overinflated feeling of self-importance. It must also be recognized, however, that like fraud and discrimination, it is rare that proof comes from direct evidence. Instead, all the circumstances must be reviewed and from that, conclusions drawn.[13]" Footnote 13 reads: "It is for this reason that Nghiem felt it so important to tell his entire story at the arbitration and not simply address the 'incidents' as the Company had wanted" (Nghiem Brief, p. 9).

Nghiem, in fact, told his entire story at the arbitration, but that "story", which has been fully studied and carefully considered herein, did not establish what Nghiem claims that it circumstantially did. What is left out is the fact that Nghiem acted as he in fact did as described above, which he did not, in any material way, even deny. There is simply no showing why the Company would want to get rid of an acknowledged productive Employee unless there was some objective and overriding reason to do so. That the Company considered the Complainant a productive Employee in terms of his technical skills and efforts was shown by his performance appraisal.

The claim that others were trying to steal Nghiem's glory such as his negotiating the Cadence contract is belied by Hulse's offering Nghiem an hour and a half at the world-wide ACE meeting to describe what Nghiem was doing. Rather, what the Company sought to do was to improve the Complainant's shortcomings as it believed them to be. If they were not true, as the Complainant contends, he had internal processes to follow in addition to good work performance. The evidence did not establish that Hulse was a supervisor who had any reputation

for vengeance or dishonesty, let alone any specific examples thereof except as alleged but not proved by Nghiem. The record outside of the Complainant's own assertions, provides no factual basis that the Company's charges were mere pretense or that the Complainant was provoked by the Company to provide grounds for the Company to fire him. And, Nghiem's defenses, falling short as they do, establish no basis to find any fraud, any intentional infliction of emotional distress, any defamation or any of the other claims made by Nghiem.

Nghiem contends that *per se*, he could not have accomplished all that he did unless he got along with others as a "team player." Yet, as noted in the testimony, as a better team member, according to the Company, more could be accomplished easier; that simply because there was a problem didn't completely "break" the team. More would be accomplished if Nghiem was perceived as less pushy and more considerate of others' ideas (Tr. 803).

Nghiem also contends that his job appraisals at Toshiba, where he was employed shortly after leaving NEC, shows that NEC's appraisal was skewed. That contention does not follow given the evidence of what occurred at NEC.

DISCRIMINATION:

Further, the record does not establish any discrimination against Nghiem because he is a Vietnamese American. Nghiem did not testify that there was any overt discriminatory incident. He is but one of many non-white Americans who worked at NEC at the time that he did. Nor did the evidence circumstantially establish that there

was any national origin discrimination that resulted in his termination by the Company, or was utilized by the Company in any form toward Nghiem.

DECISION:

Peter Nghiem was terminated by NEC Electronics for just cause. He is not entitled to any damages.

/s/ John Kagel
Arbitrator

No. 92-16155

In The United States Court of Appeals
for the Ninth Circuit

PETER P. NGHIEM, PLAINTIFF AND APPELLANT

v.

NEC ELECTRONICS, INC., a California corporation;
NEC CORPORATION (TOKYO);
JAPAN (NIPPON ELECTRIC COMPANY),
a Japanese corporation;

HIRO HASIMOTO, DR. H. YOSHIZAWA,
GRANT HULSE and DOES 1-100 Inclusive,
DEFENDANTS AND APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA BEFORE THE HONORABLE RONALD M. WHYTE

BRIEF OF DEFENDANT-APPELLEE NEC ELECTRONICS INC.

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I

STATEMENT OF JURISDICTION (CIRCUIT RULE 28-2.21)

The United States District Court for the Northern District of California had jurisdiction over this matter pursuant to 42 U.S.C. section 2000e-5(f)(3) and 28 U.S.C. section 1331.

The District Court's order granting Appellee NECEL's motion for confirmation of the arbitration award and dismissing Appellant's Complaint is a final order since no issues remain undecided. The United States Court of Appeal for the Ninth Circuit has jurisdiction over this appeal under 28 U.S.C. section 1291.

The date of entry of judgment of the order herein appealed was June 9, 1992. The notice of appeal was filed June 16, 1992. This appeal was timely filed under Federal Rule of Appellate Procedure 4. On appeal, this court will review the District Court's order confirming the arbitration award under an abuse of discretion standard. *Raiford v. Merrill, Lynch, Pierce, Fenner & Smith*, 903 F.2d 1410, 1413 (11th Cir. 1990).

II

STATEMENT OF ISSUE PRESENTED FOR REVIEW

The issue before this Court is whether the District Court properly granted Defendant-Appellees' motion for confirmation of the arbitration award, thereby dismissing Plaintiff-Appellant's claims.

III

STATEMENT OF CASE

A. Nature Of The Case And Disposition in District Court.

This is an appeal from a motion for confirmation of an arbitration award granted in favor of Defendant-Appellee NEC Electronics Inc. ("NECEL") and against Plaintiff-Appellant Peter P. Nghiem ("Appellant"). Appellant was employed by NECEL from 1989 until his termination in June of 1990. Pursuant to NECEL's written "Problem Resolution Process," Appellant instituted a complaint thereunder seeking relief as a result of his termination from employment at NECEL.

As a result of this process, an arbitration hearing was held. On November 19, 1991, the Arbitrator issued a decision denying Appellant his requested relief. While this was pending, Appellant initiated a civil action in Santa Clara County Superior Court. Service in the state court action was made on NECEL subsequent to the issuance of the arbitration award. Therefore, on March 6, 1992, NECEL removed the case to the U. S. District Court for the Northern District of California. On June 9, 1992, Judge Ronald M. Whyte of the District Court granted NECEL's motion for confirmation of the arbitration award, and dismissed Appellant's Complaint in its entirety. The instant appeal followed.

B. Statement Of Facts.

Appellant Peter Nghiem was employed by Appellee NECEL from 1989 until his termination in June of 1990. (*See*, District Court's Order Granting Defendant's Motion For Confirmation Of The Arbitration Award And Dismissal Of Action (hereinafter referred to as "District Court Order") at p. 1; *see also*, Defendant's Separate Statement of Undisputed Fact No. 1 (hereinafter referred to as "Undisputed Material Fact No. ___," referring to the numbered paragraphs therein) at SER C, p. 56.)[1] NECEL maintained a "Problem Resolution Process" for "disputes, problems, complaints or claims" raised by employees arising out of their own or the company's conduct or the

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[1] Appellees are designating Appellees' Supplemental Excerpts of Records as "SER." Exhibits attached to documents in the record will be referenced as "Exh.," page number designated as "p."

employment relationship, including its termination. (*See*, District Court's Order at p. 2; Undisputed Material Fact No. 3 at SER C, p. 57). NECEL's problem resolution process concludes in its "Step 4" with "final and legally binding" arbitration according to its express terms. (*See*, District Court's Order at p. 2; Undisputed Material Fact No. 4 at SER C, p. 58).

Pursuant to this process, Appellant instituted a complaint seeking relief as a result of his termination from employment at NECEL. (*See*, District Court's Order at p. 2; Undisputed Material Fact No. 5 at SER C, p. 58). As a result of Appellant following the problem resolution process through its four steps into arbitration, an arbitration hearing was held before Arbitrator John Kagel in a proceeding before the American Arbitration Association. (*See*, District Court's Order at p. 2; Undisputed Material Fact No. 6 at SER C, p. 58). Appellant presented evidence and arguments on his behalf at the arbitration hearing, and submitted a "Closing Brief" of 50 pages detailing his position to the Arbitrator. (*See*, District Court's Order at p. 2; Undisputed Material Fact No. 7 at SER C, p. 58).

The Arbitrator then issued a decision dated November 18, 1991, denying Appellant all his requested relief. (*See*, District Court's Order at pp. 2-3; Undisputed Material Fact No. 8 at SER C, p. 58). According to the Arbitrator, and as expressly set forth in Appellant's arbitration complaint, that complaint raised the following broad categories of claims: "wrongful termination, breach of implied contract, breach of covenant of good faith and fair dealing, intentional infliction of emotional distress, defamation and anti-trust . . . " (*See*, Undisputed Material Fact No. 9 at SER C, pp. 58-59). The Arbitrator also

addressed and ruled against fraudulent misrepresentation and race discrimination allegations and evidence raised by Appellant. (*See*, Undisputed Material Fact No. 9 at SER C, pp. 58-59). These are the same essential claims raised by Appellant in his First Amended Complaint at issue herein, and also in his original Complaint initiating his state court action filed prior to the arbitration decision in June of 1991. (*See*, First Amended Complaint).

IV

ARGUMENT

A. Standard Of Review Of Confirmation Of Arbitration Award.

The issue for review by this Court is whether the District Court properly granted NECEL's motion for confirmation of the arbitration award. The standard of review to be applied to the District Court's decision is an abuse of discretion standard. The Appellate Court must first determine, however, whether the arbitration award itself was arbitrary and capricious. The Court must then consider whether the District Court abused its discretion in confirming that award. *Raiford, supra*, 903 F.2d at 1413. Thus, Appellant must satisfy a dual burden. He must convince this Court that the Arbitrator's award was arbitrary and capricious, and must then also demonstrate that the District Court abused its discretion in reviewing and confirming the award.

It is the law of this Circuit "that an arbitration award will not be set aside unless it evidences a 'manifest disregard for law.' " *Todd Shipyards Corp. v. Cunard Line, Ltd.*,

943 F.2d 1056 (9th Cir. 1991). Moreover, the Appellate Court will review the arbitration award

> mindful that confirmation is required even in the face of 'erroneous . . . misinterpretations of law.' . . . It is not even enough that the Panel may have failed to understand or apply the law. . . . An arbitrator's decision must be upheld unless it is 'completely irrational,' or it constitutes a 'manifest disregard of law.'

Id. at 1060.

Thus, if the arbitration award is "within the submission, and contains the fair and honest decision of the arbitrators, after a full and fair hearing of the parties," a district court's confirmation of the award must be affirmed by an appellate court. *Id.* As set forth below, the arbitration award in the instant appeal met this standard, and was thus properly confirmed by the District Court.

B. The District Court Properly Confirmed The Arbitration Award Pursuant To The Federal Arbitration Act.

1. Federal Law Favors Arbitration.

Federal law has long favored arbitration and enforcement of arbitration awards. *United Steel Workers v. American Manufacturing Co.*, 371 U.S. 195, 80 S. Ct. 1343 (1960); *United Steel Workers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S. Ct. 1347 (1960); *United Steel Workers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S. Ct. 1358 (1960). This body of law counsels that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Mitsubishi Motors*

Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 105 S. Ct. 3346 (1985).

Under federal law, the issuance of an arbitration award generally bars any subsequent court action on the merits of the original claim. *See, Gilmer v. Interstate/Johnson Lane Corp.*, ___ U.S. ___, 111 S. Ct. 1647 (1991); *Cofrancesco v. City of Wilmington*, 419 F. Supp. 109 (D.C. Del. 1976). Indeed, as a result of this strong federal policy, arbitration has recently been held to be an appropriate forum for settling statutory disputes such as age discrimination, *Gilmer, supra,* and Title VII sex discrimination claims, *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932 (1992).

Moreover, California also maintains a strong policy favoring arbitration as an efficient and inexpensive method of dispute resolution. *See, e.g., Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street*, 35 Cal. 3d 312, 322 (1983). California courts have enforced arbitration agreements and awards in age discrimination claims, *Hall v. Nomura Securities, International*, 219 Cal. App. 3d 43 (1990), and race discrimination claims, *Spellman v. Securities, Annuities & Insurance Services, Inc.*, 8 Cal. App. 4th 452 (1992). Both federal and state law are clear that the arbitration agreements are to be liberally construed in favor of arbitration. *Mitsubishi Motors, supra; Rowland v. Painewebber, Inc.*, 4 Cal. App. 4th 279 (1992).

2. Appellant's Dispute Was Arbitrated Pursuant To The Federal Arbitration Act.

The Federal Arbitration Act ("Act" or "FAA") expresses a "liberal policy favoring arbitration agreements. . . . " *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 941 (1983). The Act applies to the resolution of disputes arising out of maritime transactions or "contracts involving commerce." 9 U.S.C. § 1, *et seq.* The Act specifically excludes from its coverage contracts of employment for workers *directly* involved in international or interstate commerce. 9 U.S.C. § 1. *Cf., American Postal Workers Union v. United States Postal Service*, 823 F.2d 466, 473 (11th Cir. 1987) (limiting any exclusion to employment contracts subject to this Act to those involving workers actually engaged in interstate or foreign commerce).

With respect to the scope of the Federal Arbitration Act, section 2 of the Act provides as follows:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, *or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract*, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (emphasis added). In the instant appeal, Appellant Nghiem was in a position and industry such

that his arbitration agreement and award can be enforced under the Act.

3. The Requirements Of The Federal Arbitration Act Have Been Satisfied.

As noted above, the Federal Arbitration Act requires *either* a written provision in a contract, *or* "an agreement in writing to submit to arbitration an existing controversy arising out of such a contract. . . . " 9 U.S.C. § 2. Thus, while Appellant correctly argues that the original employment contract which he signed did not contain an arbitration clause, his reliance on this fact is misplaced. Appellant fails to either acknowledge or dispel the significance of his letter to NECEL's Director of Human Resources requesting arbitration.

A review of the events leading up to the arbitration which Appellant now challenges clearly indicates that arbitration of Appellant's dispute was proper pursuant to the Federal Arbitration Act. On September 5, 1989, shortly after he began his employment with NECEL, Appellant signed a Receipt which provides as follows:

> I, have read Denny Mitchell's letter of introduction and acknowledge receipt of the NECEL handbook. I will read it as soon as possible. If I have questions concerning the handbook I will consult with Human Resources.

(Exhibit "H" in Appellant's Excerpts of Records).

Upon his termination on June 11, 1990, Appellant initiated NECEL's four-step problem resolution process, which is discussed in detail in the employee handbook

referenced by Appellant in the Receipt. Appellant unsuccessfully completed the first three steps of the process, which include notification of the employee's supervisor, filing a complaint with a company vice-president, and a formal review by the Personnel Committee. (Exhibit "I" in Appellant's Excerpts of Records). On September 10, 1990, Appellant was denied relief following Step 3 of the problem resolution process.

The process culminates in Step 4, which is addressed in detail at Page 5-3 of the employee handbook. (Exhibit "I" in Appellant's Excerpts of Records). With respect to Step 4, the handbook provides that: "If you desire to pursue your Complaint further, the Complaint must be submitted to an impartial arbitrator or it is waived." (Exhibit "I" in Appellant's Excerpts of Records). The handbook continues that: "The decision of the arbitrator will be final and legally binding *on the company and the employee* to the full extent permitted by law." *Id.* (Emphasis added).

Consequently, on September 21, 1990, Appellant wrote a letter to Denny Mitchell, NECEL's Director of Human Resources, which was captioned, "Request for Arbitration in Step 4 of NECEL's Complaint Procedure." (Exhibit "G" in Appellant's Excerpts of Records). The first paragraph of that letter states that: "I [Nghiem] would like to pursue to the Step 4 of NECEL's Complaint Procedure since I am not satisfied with the decision of the Executive Personnel Comittee (sic) in response to my appeal in Step 3." *Id.* In the closing paragraph of the letter, Appellant requests that NECEL "please provide me the information on arbitration process in Step 4 of

NECEL's Complaint Procedure and let me know what need [sic] to be done to prepare for the arbitration." *Id.*

This written request for arbitration was signed by Appellant Nghiem. As Judge Whyte noted in his Order confirming the arbitration award, Appellant "did expressly agree to arbitrate when he elected *in writing* to proceed with the NECEL resolution process and, in particular, requested to proceed to step four (4) of that process, binding arbitration." (Exhibit "A" in Appellant's Excerpts of Records, p. 3). (Emphasis in original). Thus, the requirement of the Federal Arbitration Act that there be a written agreement to arbitrate a dispute arising from a contract has been satisfied.

Moreover, Appellant's contention that there was no "express" agreement to arbitrate ignores Appellant's own verified pleading contained in his First Amended Complaint. In that pleading, Appellant makes sworn statements that he relied upon the binding arbitration policy of NECEL as part of his basis for claiming that he had an employment contract providing for termination only for good cause. (See, First Amended Complaint, paras. 4 and 4(c) at pages 4 and 6 thereof.)

The existence and application of this binding arbitration procedure to Appellant's claims are completely undisputed. Under California law, such policy manual provisions are specifically enforceable as contracts in themselves. *See, Kerr v. Rose*, 216 Cal. App. 3d 1551 (1990) (finding a cause of action for breach of an employment contract based on an allegation that the employer had failed to follow a written layoff policy); *Kern v. Levolor Lorentzen, Inc.*, 889 F.2d 772 (9th Cir. 1990) (affirming a

jury verdict in favor of an employee claiming breach of an implied-in-fact employment agreement not to be wrongfully laid off based on an employee handbook seniority policy).

The District Court further correctly noted in its Order that Appellant "voluntarily participated in the arbitration without ever objecting to the process and/or indicating that he believed the process would be non-binding." (Exhibit "A" of Appellant's Excerpts of Record, p. 3). It is axiomatic that, regardless of whether a party may have refused to arbitrate an issue, when the party proceeds to arbitration, it no longer has the right to raise the issue that its claims should not have been subject to arbitration. *See, Piggly-Wiggly Operators Warehouse, Inc. v. Piggly-Wiggly Operators Warehouse Independent Truck Drivers Union*, 611 F.2d 580 (5th Cir. 1980).

The requirements of the Federal Arbitration Act have been satisfied, and the arbitration award was not arbitrary and capricious. Further, it is clear that the District Court did not abuse its discretion in confirming the award. Accordingly, the District Court's Order confirming the arbitration award and dismissing Appellant's claims should be affirmed.

C. Arbitration Pursuant To The Federal Arbitration Act Is Appropriate For The Resolution Of Disputes Arising From Alleged Violations Of Title VII.

In support of his assertion that the District Court improperly confirmed the arbitration award, Appellant contends that disputes arising out of Title VII protections

are not subject to arbitration. Appellant's entire argument regarding the inappropriateness of arbitration in this context, however, has been displaced by the recent decision of the United States Supreme Court in *Gilmer v. Interstate/ Johnson Lane, Corp.*, ___ U.S. ___, 111 S. Ct. 1647 (1991), and the line of cases following it.

As noted by the Eleventh Circuit Court of Appeals in the most recent of these cases, "it is clear that Title VII discrimination claims are subject to compulsory arbitration." *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698, 699 (11th Cir. 1992). Indeed, the Ninth Circuit itself has recently upheld an employer's right to arbitrate a Title VII claim, noting that the plaintiff failed to meet "her burden of showing that Congress, in enacting Title VII, intended to preclude arbitration of claims under the Act." *Mago v. Shearson Lehman Hutton, Inc., supra,* at 935.

Appellant has neither considered nor addressed this controlling line of cases, and has based his argument on the United States Supreme Court's decision in *Alexander v. Gardner-Denver Co*, 415 U.S. 36, 94 S. Ct. 1011 (1974). In *Gilmer*, however, "the Supreme Court rejected the argument that the *Alexander* line of cases illustrates Congress' intent to preclude arbitration in a commercial contract setting." *Mago, supra,* 956 F.2d at 935. Moreover, the Sixth Circuit Court of Appeals has stated that, "we find reliance on *Alexander* in this context to be foreclosed." *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 308 (6th Cir. 1991).

In *Alexander*, the Supreme Court considered whether a union employee was precluded from pursuing an action under Title VII after he had been unsuccessful in an

arbitration compelled by his collective bargaining agreement. In deciding that the employee was not so precluded, the Court analyzed the purposes and enforcement scheme embodied in Title VII. Although "the Supreme Court does not overrule *Alexander* in *Gilmer*, it does reject a reading of *Alexander* as prohibiting the arbitration of employment discrimination claims." *Id.*

Specifically, in response to the arguments based upon *Alexander*, the Court in *Gilmer* states:

> There are several important distinctions between the *[Alexander v.] Gardner-Denver* line of cases and the case before us. First, those cases did not involve the issue of the enforceability of an agreement to arbitrate statutory claims. Rather, they involve the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims. Since the employees there had not agreed to arbitrate the statutory claims, and the labor arbitrators were not authorized to resolve such claims, the arbitration in those cases understandably were held not to preclude subsequent statutory actions. Second, because the arbitration in those cases occurred in the context of a collective-bargaining agreement, the claimants were represented by their unions in the arbitration proceedings. An important concern, therefore, was the tension between collective representation and individual statutory rights, a concern not applicable to the present case. Finally, those cases were not decided under the FAA, which as discussed above, reflects a "liberal federal policy favoring arbitration agreements." [Citation omitted.] Therefore, those cases provide no basis for refusing to enforce

> Gilmer's agreement to arbitrate his ADEA claim.

Gilmer, supra, 111 S. Ct. at 1657.

This "rejection of *Alexander* is especially forceful because the stockbroker-employee in *Gilmer* 'vigorously asserte[d]" that *Alexander* "preclude[d] arbitration of employment discrimination claims.' " *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229, 230 (5th Cir. 1991) (holding that Title VII sex discrimination claims can be properly subjected to compulsory arbitration).

California courts have also held that statutory discrimination claims are subject to arbitration. Most recently, the California Court of Appeal required compulsory arbitration of a race discrimination claim based on the California Fair Employment and Housing Act ("FEHA"). *Spellman v. Securities, Annuities & Insurance Services, Inc., supra.* In *Spellman,* the court dismissed the argument that claims of race discrimination are of greater concern under the Constitution than the age claim raised in *Gilmer. Id.* at 463. *See, also, Roe v. Kidder Peabody & Co.,* 52 Fair Empl. Prac. Cas. 1865 (S.D.N.Y. 1990) (compelling arbitration of Title VII race discrimination claim pursuant to Federal Arbitration Act).

It has become readily apparent, in the wake of *Gilmer* and its progeny, that discrimination claims arising pursuant to Title VII can be the subject of compulsory arbitration under the Federal Arbitration Act. Appellant's reliance on the line of cases predating *Gilmer* is misplaced, and his entire argument is without merit. The District Court's Order confirming the arbitration award should be affirmed.

D. Antitrust Claims Are Proper Subjects Of Arbitration Pursuant To The Federal Arbitration Act.

As his final argument that the District Court erred in confirming the arbitration award, Appellant asserts that "[a]greements to arbitrate federal antitrust issues are not enforceable." Brief of Appellant-Plaintiff, p. 26. This assertion is simply incorrect. Appellant bases his entire argument on the holding of the Second Circuit Court of Appeals in *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968) and cases predating that decision. Appellant claims that the *American Safety* holding is "uniformly adopted by the Courts of Appeals." Brief of Appellant-Plaintiff, p. 26.

However, following the United States Supreme Court's decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S. Ct. 3346 (1985), the validity of the *American Safety* case is questionable, at best. In *Mitsubishi*, the Supreme Court announced its "skepticism of certain aspects of the *American Safety* doctrine," and refused to accept its holding that antitrust claims are not suited for arbitration. *Id.* at 3356. In so doing, the Court engaged in a detailed analysis of the policies and rationale which guided the Second Circuit in reaching its conclusion. The Court concluded that the concerns expressed in *American Safety* were no longer valid. *Id.*

In undertaking this careful analysis, the Court noted that:

> At the outset, we confess to some skepticism of certain aspects of the *American Safety* doctrine. . . . [T]he doctrine comprises four

> ingredients. First, private parties play a pivotal role in aiding governmental enforcement of the anti-trust laws by means of the private action for treble damages. Second, "the strong possibility that contracts which generate anti-trust disputes may be contracts of adhesion militates against automatic forum determinations by contract." Third, antitrust issues, prone to complications, require sophisticated legal and economic analysis, and thus are "ill-adapted to strengths of the arbitral process, i.e., expedition, minimal requirements of written rationale, simplicity, resort to basic concepts of common sense and simple equity." Finally, just as "issues of war and peace are too important to be vested in the generals, . . . " decisions as to antitrust regulation of business are too important to be lodged in arbitrators chosen from the business community – particularly those from a foreign community that has had no experience with or exposure to our law and values." *See, American Safety*, 391 F.2d. at 826-827.

Id. at 3356.

The Court addressed the first concern, which it termed "the core of the *American Safety* doctrine," in great detail, and acknowledged the "fundamental importance to American democratic capitalism of the regime of the antitrust laws." *Id.* The Court concluded that "the importance of the private damages remedy, however, does not compel the conclusion that it may not be sought outside an American court." *Id.* The Court reasoned that there is no basis for assuming that arbitration will not provide an adequate mechanism, and pointed out that "the courts of the United States will have the opportunity at the award-

enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed." *Id.* at 3359. (*See*, generally, the Court's discussion at pp. 3358-3361).

The *Mitsubishi* Court also found the second *American Safety* concern to be unjustified. The "mere appearance of an antitrust dispute does not alone warrant invalidation of the selected forum on the undemonstrated assumption that the arbitration clause is tainted." *Id.* at 3357. The Court noted that, absent a showing that would warrant setting aside the forum selection clause, such as fraud or undue influence, "there is no basis for assuming the forum inadequate or its selection unfair." *Id.*

The Court also easily dismissed the third *American Safety* concern. The Court instead expressly emphasized that adaptability and access to expertise are hallmarks of arbitration. The Court explained that the "anticipated subject matter of the dispute may be taken into account when the arbitrators are appointed, and arbitral rules typically provide for the participation of experts either employed by the parties or appointed by the tribunal." *Id.* Moreover, "it is often a judgment that streamlined proceedings and expeditious results will best serve their needs that causes parties to arbitrate their disputes." *Id.* The Court summarized that "the factor of potential complexity alone does not persuade us that an arbitral tribunal could not properly handle an antitrust matter." *Id.*

The Court also rejected the final *American Safety* concern that an arbitration panel will pose too great a danger of innate hostility to the constraints on business conduct that antitrust law imposes. The Court "decline[d] to

indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators." *Id.* at 3357-3358.

Thus, the precedential significance of *American Safety* has been effectively foreclosed by the Supreme Court. Accordingly, arbitration pursuant to a valid arbitration agreement, is an appropriate forum for the resolution of antitrust disputes. Appellant's argument is thus baseless and wholly without merit.

Finally, Appellant contends that the arbitration award is defective because the Arbitrator in the instant matter "admitted that he lacks the expertise in antitrust issues."[2] Brief of Appellant-Plaintiff, p. 29. However, even a cursory examination of what the Arbitrator actually stated indicates *not* that he lacked any necessary expertise. Instead, he simply saw no legal validity to Appellant's position but invited Appellant to persuade him of such validity if he could. Obviously, Appellant failed to do this, which is *not* a legitimate basis for overturning the arbitration award. Of equal or even greater

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[2] This argument and Appellant's entire supporting declaration with its accompanying exhibits, were not presented to the District Court and are matters not properly before this Court. *See, K-2 Ski Company v. Head Ski Co., Inc.*, 506 F.2d 471, 475 (9th Cir. 1974). Defendant-Appellant accordingly objects to any consideration of arguments and evidence relying on such matters, specifically including Appellant's contentions in his declaration that he was misled and failed to understand that binding arbitration was being conducted. More significantly, however, none of those contentions change in any way the correctness of the District Court's dismissal of Appellant's claim, as otherwise set forth by the points and authorities in this opposing Brief.

significance, this Court has noted that "an arbitrator's decision must be upheld unless it is 'completely irrational,' or it constitutes a 'manifest disregard of law.' " *Todd Shipyards, supra*, 943 F.2d at 1060. Confirmation of the award is required even in the face of "erroneous . . . misrepresentations of law." *Id.* It is not even enough that the arbitrator *"may have failed to understand or apply the law. . . . "* (Emphasis added). *Id.* Thus, Appellant's position in this respect has neither any factual or legal merit whatsoever.

Moreover, Appellant does not allege that the arbitrator did not render an honest decision. The record is clear, as evidenced by Appellant's own fifty-page "Closing Brief," that Appellant received a full and fair hearing. *See, Todd Shipyards, supra*, 943 F.2d at 1060. Thus, even if the arbitrator did not fully understand the antitrust issues, rather than simply disagreeing with Appellant about their validity, consistent with the law of this Circuit, his award must be upheld. *Id.*

Accordingly, the District Court properly confirmed the arbitration award pursuant to the Federal Arbitration Act.

E. Regardless Of Whether The District Court Erred In Confirming The Arbitration Award, The Order Of The District Court Should Be Affirmed Because The Law, As Correctly Applied, Requires The Same Result.

As discussed in the preceding sections, the District Court properly granted Appellee NECEL's motion for confirmation of the arbitration award and dismissal of Appellant's claims. In its moving papers filed in the

District Court, Appellee NECEL also alternatively requested the court to dismiss Appellant's claim for failure to state a claim pursuant to Federal Rule of Civil Procedure Rule 12(b)(6), or for summary judgment and/or summary adjudication pursuant to Federal Rule of Civil Procedure 56. The District Court did not address these requests, based upon its decision to confirm the arbitration award. Thus, even assuming *arguendo* that Judge Whyte incorrectly granted Appellee NECEL's motion for confirmation of the arbitration award, the District Court's judgment should be affirmed if *either* of Appellee's alternative motions would require the same result.

This reflects the well-settled appellate practice rule that,

> . . . [A] judgment, which is correct in ultimate effect, will not be disturbed on appeal even though the lower court relied upon a wrong ground or gave an untenable reason for its action. *The issue on appeal is the correctness and ultimate effect of a judgment and not the reason or reasons given for it by the trial court.* If the judgment is sustainable upon any legal basis, it will be upheld on appeal despite the erroneous or untenable reasons given by that court for its entry.

In re Public Service Co. of New Hampshire, 879 F.2d 987, 989 (1st Cir. 1989).

In *Plaine v. McCabe*, 797 F.2d 713 (9th Cir. 1986), this Court applied this rule to affirm a district court's actions dismissing a case. In that case, the defendants raised on appeal several alternative grounds for dismissing a case

which were originally raised in their moving papers in the district court. This Court noted the general rule that an appellate court may affirm the district court's ruling on any basis supported by the record. "If the opinion below is correct, it must be affirmed, even if the district court relied on wrong grounds or wrong reasoning." *Id.* at 722, *citing*, *Keniston v. Roberts*, 717 F.2d 1295, 1300 and n.3 (9th Cir. 1983). *See also*, *Riley Co. v. Commissioner*, 311 U.S. 55, 59, 61 S. Ct. 95, 97 (1940) (where the decision below is correct, it must be affirmed by the appellate court even though the lower tribunal gave the wrong reason for its action).

Thus, if either of Appellee NECEL's alternative theories raised below would require the same result reached by the District Court herein, the order of the District Court must be affirmed. As the following discussion will demonstrate, both alternative theories so require.

1. Regardless Of Confirmation of the Arbitration Award, The District Court Could Have Dismissed Appellant's Complaint For Failure To State A Claim Is Barred By *Res Judicata* And/Or Collateral Estoppel Arising From The Arbitration Award.

Even if the District Court's confirmation of the arbitration award is deemed incorrect, the award still may be considered as final for *res judicata* or collateral estoppel purposes. *See*, *Wellons, Inc. v. T.E. Ibberson Co.*, 869 F.2d 1166, 1168 (8th Cir. 1989); *American Fed. of Television & Radio Artists v. WCCO*, 934 F.2d 987, 991 (8th Cir. 1991). In order to apply collateral estoppel or *res judicata*, the Court must determine: (1) whether the issues at arbitration and

before the court are the same; (2) whether there was a final judgment on the merit in the arbitration; (3) whether the party sought to be estopped was a party to the arbitration; and (4) whether the party sought to be estopped had a full and fair opportunity to be heard at the arbitration hearing on the issues to be adjudicated. *Wellons, Inc., supra,* 869 F.2d at 1170; *American Fed. of Television & Radio Artists, supra,* 934 F.2d at 991. In a wrongful termination claim, a crucial issue is what the arbitrator determined to be the reason for the party's discharge, which will bind the Court under the doctrine of collateral estoppel and support summary judgment based thereon. *See, Vacca v. Viacom Broadcasting of Missouri, Inc.,* 875 F.2d 1337, 1339 (8th Cir. 1989).

In this case, the issues clearly are the same, as confirmed by a review of the Appellant's arbitration complaint, the arbitration award itself, the Appellant's original Complaint and the First Amended Complaint. All of the essential issues raised in the claims in the First Amended Complaint were addressed by the Arbitrator. The only causes of action in the First Amended Complaint not expressly addressed by the Arbitrator are the Fifth Cause of Action for negligent infliction of emotional distress, the Ninth Cause of Action for unjust enrichment, and the Eleventh Cause of Action for conspiracy. These are all derivative claims based on the other claims already specifically addressed and dismissed by the Arbitrator. Since the same essential facts have already been decided, these claims must be precluded, as well as the claims the Arbitrator specifically addressed, on the basis of collateral estoppel and/or *res judicata*. (*See,* Undisputed

Material Fact No. 8 at SER C, p. 58); *Vacca v. Viacom Broadcasting of Missouri, Inc., supra.*

The arbitration award itself was also clearly a judgment on the merits of the Appellant's claims, and Appellant clearly was a party to the proceedings. (*See,* Undisputed Material Fact No. 9 at SER C, p. 58-59). The final prong of the analysis, that Appellant was given a full and fair opportunity to be heard, was confirmed simply by the 50-page length of his own "Closing Brief" detailing the evidence and argument that he submitted. (*See,* Undisputed Material Fact No. 7 at SER C, p. 58). Thus, all of the requirements for application of collateral estoppel and/or *res judicata* are met in this case.

As the Ninth Circuit held in affirming a lower court's granting of summary judgment,

> . . . the subject matter of the first cause of action was a part of the claim submitted to the arbitrators. Their award in "full settlement of all claims submitted" therefore disposed of that cause of action, leaving nothing pending in the district court.

Albin Stevedore Co. v. Central Rigging & Contracting Corp., 308 F.2d 347 (9th Cir. 1962). Relying on the *Albin Stevedore Co.* case, the court in *Dalow Industries, Inc. v. Jordache Enterprises, Inc.,* 631 F. Supp. 774, 778 (S.D.N.Y. 1985) granted a motion to dismiss for failure to state a claim on the basis that an arbitration award disposed of the issues raised in the party's complaint. The District Court, had it reached this alternative theory below, could have entered an order dismissing the Appellant's First Amended Complaint on the same basis, and specifically that it failed to state a claim upon which relief can be granted, as barred

by *res judicata* and/or collateral estoppel arising from the arbitration award. *See also, Ivery v. United States*, 686 F.2d 410 (6th Cir. 1982), *cert. denied*, 103 S. Ct. 1428 (1983).

2. The District Court Could Have Dismissed The Appellant's Action On A Summary Judgment Basis Because Of The *Res Judicata* Effect Of The Arbitration Award Regardless Of Its Confirmation.

With particular respect to summary judgment, it is well recognized that, to avoid summary judgment, a party must demonstrate the existence of significant probative evidence relevant to disputed factual issues which are truly material and require litigation. *OSC Corp. v. Apple Computer, Inc.*, 601 F. Supp. 1274 (C.D. Cal. 1985), *aff'd.*, 792 F.2d 1464, 1466-67 (9th Cir. 1986). Where, as here, the moving party has shown an absence of material triable issues of fact and the opposing party has failed to come forward with specific facts, and not merely allegations, to show that genuine factual issues remain for trial, summary judgment should be entered by the Court. *See, DeHorney v. Bank of America Nat'l. Trust & Sav. Assn.*, 879 F.2d 459 (9th Cir. 1989); *Donahue v. Windsor Locks Bd. of Fire Com'rs.*, 834 F.2d 54 (2nd Cir. 1987).

Whether or not the confirmation of the arbitration award was proper, the District Court could have entered summary judgment based thereon, because of the *res judicata* effect of the arbitration award. *See, Wellons, supra*, 869 F.2d at 1168; *Thibodeau v. Crum*, 4 Cal. App. 4th 749 (1992).

In its recent decision in the *Thibodeau* case, the California Court of Appeal thoroughly reviewed the legal principles regarding the application of an arbitration award to a subsequent civil action involving matters that were or could have been raised in a preceding arbitration. Just as the federal courts have held, the California court confirmed that the doctrine of *res judicata* applies to arbitration proceedings as well as to judicial proceedings, and to matters that could have been arbitrated but were not. *Id.* at 755.

Equally significantly, the *Thibodeau* court confirmed that an arbitration award, whether or not it already has been confirmed, can act "as the equivalent of a final judgment" for purposes of application of *res judicata. Id.* at 759. As the *Thibodeau* court observed, quoting from *Lehto v. Underground Constr. Co.*, 69 Cal. App. 3d 933, 939 (1977), "Once a valid award is made by the arbitrator, it is conclusive on matters of fact and law and all matters in the award are thereafter *res judicata* . . . [E]very presumption favors the arbitrator's award, and the merits of the award, either on questions of law or fact, are generally not subject to review." *Thibodeau v. Crum, supra,* at 759-60.

The same essential principles regarding arbitration and its *res judicata* effect as set forth in the *Thibodeau* decision are followed by the federal courts under the Federal Arbitration Act. *See, Wellons, Inc. v. T.E. Ibberson Co., supra; American Fed. of Television & Radio Artists v. WCCO, supra; Hybert v. Shearson Lehman/American Exp., Inc.*, 688 F. Supp. 320 (N.D. Ill. 1988); *Pugol v. Shearson/American Exp., Inc.*, 829 F.2d 1201, appeal after remand, 877 F.2d 132 (1st Cir. 1987). Not only does *res judicata* arise from the arbitration award, but whether or not it

has been confirmed does not affect the scope and validity of its preclusive effect on a *res judicata* basis. As the court in the *Hybert* case observed:

> Confirmation of an arbitration award in federal court does not add to the claim preclusive effect of an arbitration decision, except as to the narrow class of issues which can be raised on a motion to vacate the award. *See*, 9 U.S.C. § 10. The confirmation means only that the arbitration decision is valid, i.e., was not procured by corruption, fraud or other prohibited misconduct, and that the arbitrators have not exceeded their powers. (citations omitted.)

Hybert v. Shearson Lehman/American Exp., Inc., supra, 688 F. Supp. at 327.

Since the Appellant in this case did not even attempt to vacate the award, and obviously no longer can do so on a timely basis, it is clear that the arbitration award has a preclusive *res judicata* effect as to all of the claims he has attempted to assert in this action. Accordingly, the District Court clearly could have entered summary judgment based on the *res judicata* effect of the parties' arbitration award.

The only argument even remotely raised by the Appellant to somehow address the Appellee NECEL's motion to dismiss and motion for summary judgment is that he somehow "believed" he was not subject to binding arbitration because he assertedly refused to sign an employment contract containing an arbitration provision. This purported evidence blatantly contradicts his own sworn and verified statements in his First Amended

Complaint that he relied on the Appellee's binding arbitration procedure for employee complaints for part of his alleged contract for continuous employment requiring good cause for his discharge. (See, ¶¶ 4 and 4(c) at pages 4 and 6 of the First Amended Complaint.) Moreover, the Appellant clearly proceeded under the Appellee's policy expressly calling for binding arbitration without making any claim to the Arbitrator that he was not subject to its binding aspects. Regardless of whether the Appellant might properly have refused to submit any or all of his claims to the binding arbitration procedure, once he did, he no longer possessed the right to raise any issue that his claims should not have been subject to the arbitration procedure he elected to pursue. *See, Piggly-Wiggly Operators Warehouse, Inc. v. Piggly-Wiggly Operators Warehouse Independent Truck Drives* [sic] *Union*, 611 F.2d 580 (5th Cir. 1980); *Jarrell v. Wilson Warehouse Co.*, 490 F. Supp. 412, 417 (M.D. LA. 1980); *ATSA of Calif., Inc. v. Continental Ins. Co.*, 702 F.2d 172, 175 (9th Cir. 1983).

Therefore, regardless of the propriety of the confirmation of the arbitration award, the District Court could have either dismissed Appellant's complaint for failure to state a claim as barred by the *res judicata* effect of the arbitration award, or it could have entered summary judgment based thereon as a result of the *res judicata* effect.

V

STATEMENT OF RELATED CASES

Appellee knows of no related cases pending before this Court.

VI

CONCLUSION

The District Court in the instant matter properly granted Appellee NECEL's motion for confirmation of the arbitration award which was granted in favor of Appellee NEC Electronics, Inc. and against Appellant Peter P. Nghiem. Even if the confirmation of the award was not proper, however, the judgment should be affirmed based upon one or both of Appellee's alternative grounds also presented to the District Court. Appellee NECEL, therefore, respectfully requests that this Court affirm the decision of the District Court granting its motion and dismissing Appellant's case. Appellant's appeal should be denied as it has no basis in law, and instead costs should be taxed against Appellant pursuant to Federal Rule of Appellate Procedure 39.

Date: November 16, 1992

Respectfully submitted,

LITTLER, MENDELSON, FASTIFF & TICHY
A Professional Corporation

By: David J. Murphy
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By: Keith R. Black
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Attorneys for Defendant-Appellee
NEC ELECTRONICS INC.

No. 92-16155

In The United States Court of Appeals for the Ninth Circuit

PETER P. NGHIEM, PLAINTIFF AND APPELLANT
v.
NEC ELECTRONICS, INC., a California corporation; NEC CORPORATION (TOKYO); JAPAN (NIPPON ELECTRIC COMPANY), a Japanese corporation; HIRO HASIMOTO, DR. H. YOSHIZAWA, GRANT HULSE and DOES 1-100 Inclusive,
DEFENDANTS AND APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE RONALD M. WHYTE

OPPOSITION OF DEFENDANT-APPELLEE NEC ELECTRONICS INC. TO PLAINTIFF-APPELLANT PETER NGHIEM'S REVISED REPLY BRIEF

(Filed Jan. 5, 1993)

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I

INTRODUCTION

This matter is before the Court pursuant to an appeal from a motion for confirmation of an arbitration award granted in favor of Defendant-Appellee NEC Electronics, Inc. ("NECEL") and against Plaintiff-Appellant Peter P. Nghiem ("Nghiem"). Appellant Nghiem filed his Opening Brief with this Court on October 14, 1992. In response, NECEL filed its Brief on November 16, 1992. Finally, on December 14, 1992, Nghiem filed his Reply Brief with this Court.

Concurrent with that Reply Brief, Nghiem filed a motion to exceed page limits, together with a "Supplemental Excerpts of Record." The entire filing consisted of a forty-page Reply Brief, a ten-page "Supplemental Declaration of Peter Nghiem" in support of that Brief, and an eighty-four page "Supplemental Excerpts of Records for Reply Brief of Appellant-Plaintiff."

Appellee NECEL objected to both the manner and the content of Appellant's submission, and filed a response thereto on December 16, 1992. On December 22, 1992, this Court denied Appellant Nghiem's motion to exceed the page limits, and ordered Appellant to file a

reply brief not to exceed 25 pages by December 28, 1992. In addition, the Court stated that Appellant's request to file supplemental excerpts of record as well as Appellee's opposition thereto would be referred for disposition to the merits panel.

On January 4, 1993, Appellee NECEL was personally served with a copy of Appellant's "Revised Reply Brief." In essence, the revised brief is merely a copy of the original Reply Brief, edited to satisfy the page length requirement as ordered by the Court. Consequently, the objections raised by Appellee NECEL in its December 16, 1992 filing are equally applicable to Appellant's Revised Reply Brief. Accordingly, Appellee NECEL seeks to preserve and restate its objections by filing the instant opposition. For the assistance of the merits panel, Appellee NECEL hereby sets forth its objections to Appellant's Revised Reply Brief.

Initially, Section A of Appellant's Revised Reply Brief, which is contained at pages 2 through 5, improperly raises a new legal theory for the first time. Moreover, Section D of Appellant's Revised Reply Brief, which is contained at pages 15 through 20, does not respond to issues raised in Appellee's Brief. Rather, this section functions as a wholly improper and untimely attempt on the part of Appellant Nghiem to vacate the arbitration award. In addition, Appellant's attempt to "incorporate by reference" the facts contained in the "Supplemental Declaration of Peter Nghiem" and the "Declaration of Peter Nghiem," is wholly improper.

Accordingly, for these reasons, as set forth in greater detail below, Appellee NECEL respectfully requests that

this Court strike Section A and Section D of Appellant's Revised Reply Brief and the Supplemental Excerpts of Records filed by Appellant Nghiem. In addition, Appellee NECEL requests that this Court disregard the "incorporated" facts contained in the "Supplemental Declaration of Peter Nghiem" and the "Declaration of Peter Nghiem."

II

ARGUMENT

A. The Court Should Disregard Pages 2:5 Through 5:9 Of Appellant's Revised Reply Brief Because The Discussion Contained Therein Improperly Addresses A Legal Argument For The First Time.

In his Revised Reply Brief, Appellant's first argument is captioned "Federal Arbitration Act Does Not Apply To The Instant Case Where Appellant-Plaintiff Had A Contract Of Employment Within The Meaning Of The Exclusion In 9 U.S.C. Section 1." Appellant devoted eight pages of his Opening Brief to a discussion of the trial court's allegedly improper reliance on the Federal Arbitration Act, and the reasons why the Act, in Appellant's opinion, did not apply to this case.

Appellant did not, however, raise the legal theory in his Opening Brief, as he does in Section A of his Revised Reply Brief, that "Federal Arbitration Act Does Not Apply To The Instant Case Where Plaintiff-Appellant Had A Contract Of Employment Within The Meaning Of The Exclusion In 9 U.S.C. Section 1." Appellant's attempt to abandon his previous legal theories in favor of an entirely

new one, which Appellee NECEL has not had the opportunity to address, is not proper and should not be condoned.

This Court has recently addressed this precise issue. In *Cross v. State of Washington*, this Court stated that "[i]n their reply brief, the Crosses appear to contend that they possess aboriginal rights in the disputed property. This argument, however, was not specifically and distinctly raised and argued in the Crosses' opening brief and we will therefore not consider it." 911 F.2d 341, 345 (9th Cir. 1990). *See, also, International Union of Bricklayers v. Martin Jaska, Inc.*, 752 F.2d 1401, 1404 (9th Cir. 1985) ("[W]e will not ordinarily consider matters on appeal that are not specifically and distinctly raised and argued in appellant's opening brief."); and *Sanchez v. City of Santa Ana*, 915 F.2d 424, 430 (9th Cir. 1990) ("As a general rule, an appellant may not raise an argument for the first time in a reply brief. The City offers no justification for departure from this rule, and we therefore decline to address its argument.").

Accordingly, this Court should disregard Appellant Nghiem's new argument, which is contained at pages 2 through 5 of his Revised Reply Brief, according to its well-established precedent precluding consideration of any arguments raised for the first time in a reply brief.

B. The Court Should Strike Pages 15 Through 20 Of Appellant's Revised Reply Brief, The Supplemental Declaration Of Peter Nghiem, And The Supplemental Excerpts Of Records, Because They Support An Improper Attempt To Vacate The Arbitration Award.

In his Revised Reply Brief, Appellant attempts to convince this Court to vacate the arbitration award which

was confirmed by the District Court, and which thus provided the impetus for the instant appeal. Appellant argues at Pages 15 through 20 of his Revised Reply Brief that he is "Entitled To Vacation Of The Award." This proposition is so far outside the realm of legal feasibility that it is not deserving of a lengthy response.

Preliminarily, in accordance with the discussion above in Section A, Appellant's argument that this Court should vacate the arbitration award should not be considered because it was not raised in Appellant's Opening Brief. *See, e.g., Cross v. State of Washington*, 911 F.2d 341, 345 (9th Cir. 1990); *Sanchez v. City of Santa Ana*, 915 F.2d 424 (9th Cir. 1990).

A more pressing concern for Appellant, however, is that he has *never*, in the course of this litigation, attempted to vacate the arbitration award. Appellant initiated these proceedings by filing a Complaint in the Santa Clara County Superior Court on February 5, 1992. (See Exh. A to Supplemental Excerpts of Record For Brief of Appellee-Respondent.) The case was subsequently removed to the Northern District of California by Appellee NECEL. (See Exh. B to Supplemental Excerpts of Record For Brief of Appellee-Respondent.) During the entire pendency of these lower court proceedings, Appellant never attempted to vacate the arbitration award. His misguided attempt to do so at this late stage in the litigation is patently frivolous.

The Federal Rules of Civil Procedure and Title 9 of the United States Code set forth the appropriate procedure for a party to apply to vacate an arbitration

award.[1] After reading the statutory provisions and rules together, "it is clear that a party must file a motion in order to apply to the [district] court to set aside an arbitration." *Interior Finish Contractors v. Drywall Finishers*, 625 F. Supp. 1233, 1240 (E.D. Pa. 1985). The "statutes and rules do not permit a party to initiate a challenge to an arbitration award by filing a *complaint* or an 'Application.'" *Id.* (*Emphasis added.*) Thus, even the asserted basis in Appellant Nghiem's Revised Reply Brief that his complaint was an attempt to vacate the arbitration award is wholly without legal foundation.

Accordingly, pages 15 through 20 of Appellant's Revised Reply Brief should be disregarded by this Court. Further, the "Supplemental Declaration of Peter Nghiem" and the "Supplemental Excerpts of Records for Reply Brief," which were filed concurrently with Appellant's Reply Brief, should likewise not be considered by this Court.

C. Appellee NECEL Is Entitled To Monetary Sanctions In The Amount Of Reasonable Attorney's Fees Incurred As A Result Of Appellant's Frivolous Motion To Exceed Page Limits.

Appellee NECEL renews its request for monetary sanctions. In the interest of brevity, Appellee respectfully refers this Court to Section D of the "Opposition Of Defendant-Appellee NEC Electronics Inc. To Motion Of

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[1] A detailed discussion of this procedure is set forth in *Interior Finish Contractors v. Drywall Finishers*, 625 F. Supp. 1233 (E.D. Pa. 1985) at page 1240.

Plaintiff-Appellant Peter Nghiem To Exceed Page Limits And To File Supplemental Excerpts Of Record," which was filed on December 16, 1992, in the event the Court finds it helpful or necessary to review in any greater detail the legal authority on which this request is based.

III

CONCLUSION

Appellant's attempt to improperly raise new legal arguments, as well as his illegitimate attempt to seek a vacation of the arbitration award from this Court without having timely petitioned the lower court to do so, should be wholly disregarded. Because Appellant has continued these improper assertions in his "Revised Reply Brief" after already having been put on notice of that impropriety by Appellee's Opposition to his motion to exceed page limits and file supplemental excerpts for his original reply brief, sanctions in Appellee's favor against Appellant are particularly appropriate and should be assessed.

Date: January 5, 1993.

Respectfully submitted,
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A Professional Corporation

By: /s/ David J. Murphy
DAVID J. MURPHY

By: /s/ Keith R. Black
KEITH R. BLACK

Attorneys for Defendant-Appellee
NEC ELECTRONICS INC.

IN ARBITRATION PROCEEDINGS

In the Matter of a Controversy Between:	)
PETER NGHIEM	)
and	)
NEC ELECTRONICS	)
Volume I	)
No. 7430-0287-90	)

DATE: Thursday, February 7, 1991

TIME: 10:00 a.m.

LOCATION: American Arbitration Association
417 Montgomery Street
San Francisco, California

Reported by:

CAROL FUSCO, CSR 3269

RADOCY & ASSOCIATES

63 MULLEN AVENUE

SAN FRANCISCO, CALIFORNIA 94110

(415) 285-4396

* * *

[p. 12] today than they did at any other time.

With all of that, does anybody have any other preliminary matters?

If not, we may follow the following choreography. In the first place, the company has the burden to prove that

it complies with Mr. Nghiem's employment contract in his termination.

Mr. Nghiem would have the burden with respect to any other aspects of wrongful termination, that count, to the implied breach of the covenant of good faith – I am sorry, the breach of an implied contract, namely, to prove that there is such a contract, and that it was breached;

Secondly, that there is a breach of a covenant of good faith and fair dealing, namely that there was such a covanant, which may be implied from the documents already, and secondly, that there was a breach of it;

That there was intentional infliction of emotional distress; that there was defamation; and that there was an antitrust violation, including the threshold question of whether you can even have a standing on the [p. 13] part of an individual to claim that there was an antitrust violation that would run to that individual. I just don't know. I mean, you have the burden to establish that.

Obviously, the company would then have whatever affirmative defenses it wishes to produce.

The company will go forward, presenting Mr. Mitchell, Mr. Nieto and Mr. Hulse as its witnesses, subject to cross-examination. The company contemplates that's the conclusion of its case in chief, unless something comes up.

As I have indicated, I am flexible on this, so let's not get too formal with it.

Mr. Nghiem will then testify. Then we will have the testimony of Messrs. Frolichman, Yoshizowa and Hashimoto, in whatever order Mr. Nghiem wishes to call them.

With respect to three other witnesses, Mr. Dasilva, Mr. Goto and Mr. Yamaguchi, whether or not they are required to testify will depend upon the company's study of Mr. Nghiem's offer to accept as true or substantially true what is stated in his

* * *

IN ARBITRATION PROCEEDINGS

In the Matter of a Controversy Between:	)
PETER NGHIEM	)
and	)
NEC ELECTRONICS	)
Volume III pages 378-667	)
No. 7430-0287-90	)

DATE: Wednesday, April 4, 1991

TIME: 9:30 a.m.

LOCATION: American Arbitration Association
417 Montgomery Street
San Francisco, California

REPORTER: CAROL FUSCO, CSR 3269

RADOCY & ASSOCIATES

63 MULLEN AVENUE

SAN FRANCISCO, CALIFORNIA 94110

(415) 285-4396

* * *

[p. 499] MR. NGHIEM: No.

THE ARBITRATOR: I don't know what you think the law is with respect to antitrust. I will allow you to submit that to me, with a copy to Mr. Hulse, before our next meeting so I can look it up.

MR. NGHIEM: Okay.

THE ARBITRATOR: Because I do not know of an active claim by an employee who is given a work assignment – which is all it was – and then in some view believes that that work assignment was sabotaged by somebody for lack of support, either intentionally or negligently, to lead to an antitrust violation, at least where there is no profit sharing arrangement involved.

And as a – I mean, assuming that you prove all your facts, that's it on the – you do that if you want to pursue the antitrust claim.

Now, do you have any other questions of Mr. Hulse based on his testimony?

MR. NGHIEM: Yes. Should I move on to the incidents, get to the point?

THE ARBITRATOR: You may ask your

* * *